IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN D. TIGGS, JR.; a.k.a. A'KINBO
JIHAD-SURU HASHIM, and ALL
SIMILARLY CIRCUMSTANCED INMATES,

ORDER

Plaintiff,

01-C-171-C

v.

WARDEN GERALD A. BERGE; DEPUTY
WARDEN PETER HUIBREGTSE; UNIT
SUPERVISOR BRADLEY HOMPE; UNIT
SUPERVISOR LINDA HODDY-TRIPP;
SECURITY CAPTAIN CALDWELL;
INSTITUTION COMPLAINT EXAMINERS
JOHN BELL and JULIE BIGGAR,

Defendants.

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This is a proposed civil action for injunctive, declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff is presently confined at Supermax Correctional Institution in Boscobel, Wisconsin, and wishes to bring this suit as a class action, on behalf of himself and all other inmates who are situated similarly. Although plaintiff has paid the full fee for filing his complaint, he has also asked for leave to proceed in forma pauperis. From the affidavit of indigency accompanying plaintiff's proposed complaint, I conclude that

plaintiff qualifies for pauper status.

In order to certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). I cannot make this finding in the present action for two reasons. First, plaintiff is not represented by an attorney, and it appears from the complaint and from the circumstances that plaintiff is not an attorney. Since absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. See Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also Ethnic Awareness Org. v. Gagnon, 568 F. Supp. 1186, 1187 (E.D. Wis. 1983); Huddleston v. Duckworth, 97 F.R.D. 512, 51415 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Second, even a lawyer may not act both as class representative and as attorney for the class because that arrangement would eliminate the checks and balances imposed by the ability of the class representatives to monitor the performance of the attorney on behalf of the class members. See, e.g., Sweet v. Bermingham, 65 F.R.D. 551, 552 (1975); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); see also Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 n. 5 (7th Cir. 1977), appeal after remand, 587 F.2d 866 (1978); Conway v. City of Kenosha, 409 F. Supp. 344, 349 (E.D. Wis. 1975) (plaintiff acting both as class representative and as class attorney precludes class certification). Consequently, class

certification will be denied.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). Because plaintiff is a prisoner and defendants are "employee[s] of a governmental entity," this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A(a), (b). Although this court will not dismiss plaintiff's case sua sponte for lack of administrative exhaustion, if respondents can prove that plaintiff has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Plaintiff contends that he has been retaliated against for filing lawsuits, denied access to the courts, subjected to excessive force, discriminated against on the basis of his race and for being litigious, subjected to unconstitutional conditions of confinement in the form of forced behavior modification programming, deprived of due process and prevented from sending outgoing mail. Plaintiff contends also that defendants have violated several sections of the Wisconsin Administrative Code. Plaintiff will be allowed to proceed on his claims

that defendants Hoddy-Tripp and Caldwell used excessive force against him in violation of the Eighth Amendment and that defendant Hoddy-Tripp rejected his mail in violation of the First Amendment. All other claims will be dismissed.

In his complaint, plaintiff makes the following allegations of fact.

ALLEGATIONS OF FACT

I. PARTIES

Plaintiff John D. Tiggs, Jr., also known as A'Kinbo Jihad-Suru Hashim, is a state prisoner confined at Supermax Correctional Institution. Defendant Gerald A. Berge is the warden at Supermax Correctional Institution. Defendants Peter Huibregtse, Brad Hompe, Linda Hoddy-Tripp, Captain Codwell, John Bell and Julie Biggar are employed at Supermax Correctional Institution.

II. RETALIATION FOR SEEKING JUDICIAL REDRESS

Units Alpha, Foxtrot and Echo are units at Supermax Correctional Institution; Alpha is the most restrictive unit at the prison. On January 25, 2000, plaintiff was reassigned from unit Foxtrot to unit Alpha. Plaintiff's legal property was restricted to documents containing only plaintiff's name as either plaintiff or defendant. On January 26, 2000, plaintiff wrote defendant Hoddy-Tripp, saying,

> Pursuant to the property belonging to me, that has been reissued. Staff delusively believes that I can only possess legal property which bears solely my name. Department's rules § 309.26 and § 309.29 quashes such a methology, [sic] emphatically; and have staff return "all" legals . . . [Y]ou people have intentionally impeded my (legal) assistance to other prisoners. You people are doing so arbitrarily and in reckless disregard to established law.

Plaintiff's legal property was held for approximately thirty-two days by defendant Hoddy-Tripp. For the period January 25, 2000 through March 2000, defendant Hoddy-Tripp ordered that all of plaintiff's legal routes be routed through her office and not through the intraprison mail system. (A legal route is a legal paper passed from one prisoner to another without using the United States Postal Service.) At times, defendant Hoddy-Tripp refused to forward plaintiff's legal routes when he signed the document, "sincerely your brother," began the document with the Muslim greeting, "As-Salaamu Alaykum" or used his Islamic name, "Yahya," which is "John" in Arabic. Defendant Hoddy-Tripp said that plaintiff was violating the administrative rule against using false names and titles, even though plaintiff signed also as "John Tiggs." On March 16, 2000, plaintiff filed grievance # SMCI-2000-7942, complaining that defendant Hoddy-Tripp was unjustifiably hindering and rejecting his legal routes.

On May 10, 2000, both plaintiff and inmate Michael Johnson were housed in unit Echo on "level II," a level that affords inmates greater privileges than "level I" in unit Alpha. When Johnson refused tuberculin testing, defendant Hoddy-Tripp came to unit Echo and

overheard plaintiff tell Johnson that Johnson could legally refuse the testing and ask for an alternative form of testing, such as a doctor's examination or chest x-ray pursuant to Wis. Admin. Code DOC § 311.11. Defendant Hoddy-Tripp became angry, slammed the cell door window shutters and yelled at least twice at plaintiff to "shut up" and "stop telling him that." The same day, plaintiff was returned to unit Alpha. On unit Alpha, there is a "non-visual stimuli" restriction that fluctuates at the staff's discretion. In addition, inmates on unit Alpha are allowed no electronics, no library privileges, no publications, no programming, no education program, no photographs, reduced canteen, reduced telephone privileges and no religious services, religious books or pamphlets or other religious materials except for one holy book. Inmates on unit Alpha are allowed no other books, including law books, except for a standard dictionary. Human contact on unit Alpha is reduced.

Defendant Hoddy-Tripp fabricated an adult conduct report alleging that plaintiff had incited a riot and encouraged all other inmates on tier one of unit Echo to become irate on May 10, 2000. After plaintiff was returned to unit Alpha, he wrote defendant Hoddy-Tripp and told her that she had gone beyond her boundaries when she told plaintiff to "shut up" and that she should expect identical treatment to be meted out to her by prisoners. On May 25, 2000, defendant Caldwell held a hearing about the conduct report. Although plaintiff submitted six to eight prisoner affidavits, defendant Caldwell refused to accept them. Against plaintiff's wishes, defendant Caldwell postponed the hearing with no justified reason

stated on the record. Twenty-six days later, defendant Caldwell reconvened the hearing and did not find plaintiff guilty of inciting a disturbance as had been alleged by defendant Hoddy-Tripp. Instead, defendant Caldwell found plaintiff guilty of disobeying defendant Hoddy-Tripp's order that he shut up and stop giving legal advice to Johnson. Defendant Berge exceeded the time for answering an appeal and affirmed defendant Caldwell's decision.

Plaintiff filed grievances SMCI-2000-14323 and SMCI-2000-16957; defendant John Bell dismissed both grievances and defendants Berge and Huibregtse affirmed the dismissals.

On June 6, 2000, Sergeant Keeku told plaintiff that defendant Hoddy-Tripp had intercepted plaintiff's legal property, specifically, a letter addressed to plaintiff from attorney Howard Eisenberg with accompanying statistical data relevant to plaintiff's case 99-C-480-C. That case raised an equal protection claim against Columbia Correctional Institution, the prison to which defendant Hoddy-Tripp was previously assigned. Defendant Hoddy-Tripp intercepted the mail from inmate Johnson, who had routed it to plaintiff; Hoddy-Tripp gave Johnson an ultimatum to either destroy plaintiff's legal material and exhibits or receive an adult disciplinary conduct report. Johnson did not destroy plaintiff's documents. Johnson was served a conduct report and was disciplined for alleged contraband. Defendant Hoddy-Tripp destroyed plaintiff's legal documents, saying that they were contraband.

On June 8, 2000, plaintiff wrote the associate warden of security and explained that defendant Hoddy-Tripp had stolen his legal documents. The associate warden referred the

matter back to defendant Hoddy-Tripp for reply. On June 20, 2000, defendant Hoddy-Tripp responded to plaintiff, writing

> Your above (dated) correspondence was received and reviewed by the security director and forwarded to me for a reply, which addresses receiving information from the internet. As you know, this issue resulted in the issuance of a conduct report. Therefore, I must defer an answer at this time. If you are not pleased with the outcome of the conduct report, you have the option to file an ICI for procedural errors.

This reply is misleading because plaintiff was not the individual who received a conduct report and defendant Hoddy-Tripp had already destroyed plaintiff's legal documents.

On June 21, 2000, in response to another letter from plaintiff, the security director again referred the matter to defendant Hoddy-Tripp and said that he was not aware that a conduct report had been issued.

Plaintiff filed grievance # SMCI-2000-19635. Defendant John Bell, who was an institution complaint examiner at Columbia Correctional Institution at the same time as defendant Hoddy-Tripp, dismissed the grievance.

On June 25, 2000, defendant Hoddy-Tripp created and imposed a management tool designed specifically for moving plaintiff from cell to cell within unit Alpha on a seven to 21-day cell rotation. Defendant Hoddy-Tripp imposed the cell rotation solely to harass plaintiff and in retaliation for his litigiousness. Defendant Hoddy-Tripp was determined to stop plaintiff from litigating.

Between June 28, 2000 and September 13, 2000, plaintiff was assigned to the following cells: 125, 311, 417, 315, 304, 316, 321, 219, 415, 202 and 314. Plaintiff's average stay in each cell was five to seven days. Plaintiff filed grievance # SMCI-2000-25350, alleging that defendant Hoddy-Tripp was harassing him by frequent cell reassignments. Defendants Bell and Huibregtse dismissed the grievance and quoted Meachum v. Fano, 427 U.S. 215 (1976), erroneously, saying that plaintiff has no control over where he is placed within the prison.

The Wisconsin Administrative Code vests defendant John Bell with authority to do an independent investigation and stop the retaliation by defendant Hoddy-Tripp. However, defendant Bell chose to do nothing to prevent the continued harassment and retaliation against plaintiff.

On June 29, 2000, plaintiff was assigned to cell # 311. At that time, defendant Hoddy-Tripp did not know that plaintiff had just moved into that cell. Defendant Hoddy-Tripp was on the tier near cells # 308 and # 309, where inmate Kyle Boner was refusing cell reassignment. Through the cell vent, plaintiff talked with Boner about Boner's filing a grievance and legal steps he could take against defendant Hoddy-Tripp. Defendant Hoddy-Tripp overheard plaintiff giving Boner legal advice; promptly, she fabricated conduct report #1113825 in which she alleged that plaintiff had papered the window into his cell. On the basis of the allegations, defendant Hoddy-Tripp justified removing all papers from plaintiff's

cell. At the time of the alleged incident, plaintiff had not yet received any of his property. Plaintiff did not receive any of his property until 3:30 a.m., long after the time defendant Hoddy-Tripp alleged that plaintiff had papered the cell window. Papering the cell window is usually done by using paper and paste made of soap or toothpaste to cover the view into the cell.

Plaintiff had accumulated well over one month of adjustment confinement, described in § DOC 303.69. Subsection 3 allows inmates in adjustment confinement to retain their legal materials. Defendant Hoddy-Tripp created and imposed a prison rule that is inconsistent with the language of the regulation when she required plaintiff to live in a stripped cell with only his linen and clothing when he was sanctioned with adjustment segregation.

Defendant Hoddy-Tripp did not allow plaintiff to litigate other inmates' cases or to return the legal property of other inmates to them. In early July 2000, plaintiff wrote a letter to Mr. Parisi asking that he be allowed to return the legal work of other inmates to them. On July 13, 2000, Parisi told plaintiff that defendant Caldwell would talk to him about the request. Defendant Caldwell failed to address the matter and two prisoners whose property was in plaintiff's possession were prejudiced.

On July 3, 2000, plaintiff was served with conduct report # 1172924 for a torn pillow case, a minor rule infraction. Defendant Hoddy-Tripp conducted the hearing and imposed

as a sanction the loss of law library privileges. Wis. Admin. Code § DOC 303.72 does not allow the loss of specific privileges unless those privileges are abused. Plaintiff has never abused his privilege of law library usage.

On July 15, 2000, plaintiff received conduct report #1172972 for sleeping on the floor in front of the vent during a hot summer night, a minor rule infraction. Defendant Hoddy-Tripp conducted the hearing and imposed a sanction of loss of law library privileges. She imposed this sanction in retaliation for plaintiff's litigiousness.

On July 31, 2000, defendant Hoddy-Tripp had plaintiff removed from his cell for a status change from program to adjustment segregation. While plaintiff was undergoing a visual body cavity search pursuant to the status change, defendant Hoddy-Tripp entered plaintiff's cell with Officer Ewing and removed all of plaintiff's legal materials pursuant to her new rule governing adjustment segregation. Plaintiff told staff and defendant Hoddy-Tripp that the adjustment segregation sanction was invalidated by the remand of conduct reports #1113825 and #1172997. Defendant Hoddy-Tripp said, "a remanded hearing proceeding does not preclude (the sanction aforementioned) from being served," or words to that effect. Plaintiff filed grievance # SMCI-2000-22063; defendant Bell dismissed the grievance for having too many issues. Plaintiff appealed the dismissal to defendant Berge, who stated that defendant Bell was correct because plaintiff had used the term "etc." Plaintiff appealed to the corrections complaint examiner, who remanded the grievance back

to defendant Bell three or four times. Defendant Bell continued to willfully overlook the unlawful confiscation of plaintiff's legal property by defendant Hoddy-Tripp.

Defendant Hoddy-Tripp imposed an alien management tool or "two officer contact" in an attempt to harass plaintiff. When the tool was in effect, any time staff interacted with plaintiff, there were two staff members present. The restriction was in place for approximately 90 days; defendant Hompe removed the restriction on September 15, 2000. The tool served no penological function or security concern. Any restriction on an inmate extends his level one status and prolongs his time spent in unit Alpha. Plaintiff filed grievance SMCI-2000-24747, which was dismissed by defendant Bell.

On September 1, 2000, Officer Elk brought plaintiff a document that had been placed in the legal route and had been missing for sixty-eight days. The document contained contemplated pleadings about the conditions of confinement at Supermax Correctional Institution and bore the handwriting of defendant Hoddy-Tripp. Plaintiff filed grievance SMCI-2000-25361. Defendant Biggar did not investigate the grievance and even though defendant Hoddy-Tripp indicated that she had intercepted the legal route before passing it on to plaintiff, the institution complaint examiner said,

> Ms. Hoddy reviewed the dates of when the inmates in question were on her unit in conjunction with when they may have been transferred to other units. She has been unable to come up with a reasonable explanation as to where the documents may have been if they, in fact, were not in the possession of the inmates.

Defendant Biggar initiated a change in the legal routing system. After a complaint was filed in Jones v. Berge, 00-C-421-C (W.D. Wis. 2000), the assault on inmate's legal materials intensified. Defendant Hompe replaced defendant Hoddy-Tripp as the unit manager for unit Alpha; Hompe imposed new rules that prohibited all legal books on unit Alpha.

After plaintiff's legal books were taken on October 6, 2000, when plaintiff was away from his cell, plaintiff filed grievance # SMCI-2000-28729. Defendant Bell dismissed the grievance and ignored defendant Hompe's violations of Wis. Admin. Code §§ DOC 303.70(3) and 309.20(3)(f). Defendants began interpreting what constituted legal material to be routed and allowed staff to use their discretion to reject legal materials when Islamic or non-Islamic greetings were given or if "a.k.a." preceded the signing of the Muslim name. Plaintiff filed grievance # SMCI-2000-30578, alleging that legal mail was being returned ever since the lawsuit against the prison conditions had been filed. Plaintiff's complaint was affirmed to the extent that plaintiff contended that inmates should not be expected to know the name of the Clerk of Court in each jurisdiction in which he might file suit; defendant Bell, the institution complaint examiner, concluded that plaintiff should be reimbursed for postage and that in the future mailings addressed to "Clerk of Court" should be mailed promptly provided all other mailing criteria were met, even if the envelope did not indicate the clerk's name. Defendant Berge enacted policy #302.00, which prohibits the routing

through the legal route of any document that is not handwritten. The policy prohibits the routing of criminal transcripts, case law, briefs written by attorneys, court decisions and order, exhibits and other legal material.

On November 6, 2000, plaintiff wrote to Secretary Litscher. On November 20, 2000, defendant Berge responded for Secretary Litscher and told plaintiff that the Department of Corrections' Office of Legal Counsel and the Department of Justice had approved the restriction on routing non-handwritten items because inmates may use the United States Postal Service to mail photocopied legal materials. However, indigent inmates such as plaintiff may not use the postal service. Plaintiff has been unable to return to inmates their criminal transcripts. Defendants Biggar and Richardson refuse to process photocopied materials mailed through the United States Postal Service, alleging that the materials are personal property of the inmate and processing them would violate § DOC 303.40. Plaintiff filed grievance # SMCI-2000-33908, complaining about the rejection of photocopied caselaw being sent to him by a co-plaintiff in case # 99-C-480-C. Defendant Biggar dismissed the grievance. On November 22, 2000, defendant Biggar sent plaintiff a memorandum about sending photocopies of legal pleadings to the co-plaintiffs in case # 99-C-480-C, stating,

> I have contacted the Clerk's Office for the W. D. of Wisconsin. I was informed that up until an attorney was retained in Case No. 99-C-480-C, copies of all court-issued documents were sent to each co-plaintiff. . . . [I] see

> no reason why . . . photocopies to each other should be passed through legal route.

On November 12, 2000, plaintiff was served with conduct report #1210693 for answering another inmate's legal question while plaintiff was in the law library. Defendant Berge disciplined plaintiff.

On December 12, 2000, plaintiff was returned to unit Alpha for allegedly disobeying written orders. Plaintiff appealed to the warden, pointing out the appendix to § DOC 303.24, which provides that "[a] violation of this section should not be charged where the order violated (answering an inmate's legal questions) was a posted bulletin and there is a more specific section which covers the same thing. (§ 303.29)."

On January 18, 2001, defendant Richardson and his mailroom staff intercepted plaintiff's copy of Wis. Stat. ch. 227 that had been mailed to him from someone outside the prison. Plaintiff filed grievance # SMCI-2001-2698 challenging the interception; defendant Biggar dismissed the grievance, stating, "Inasmuch as there has been no evidence submitted to establish how the documents were received. . ." The mailroom noted on form DOC 243, "Notice of Non-Delivery of Mail," that the statutes had been received.

II. CRUEL AND UNUSUAL PUNISHMENT

On June 29, 2000, while plaintiff was asleep, defendants Hoddy-Tripp and Captain

Caldwell approached plaintiff's cell armed with chemical incapacitating agents. Defendants Hoddy-Tripp and Caldwell demanded that plaintiff give them his legal property or show them a court document indicating that he had a deadline within thirty days. Plaintiff protested vehemently about both the taking of his legal property and the requirement that he show defendant Hoddy-Tripp court deadlines. While plaintiff was sitting on his bunk going through his legal papers with his face approximately level with the trap door, defendant Caldwell sprayed chloroacetophenone, an incapacitating agent, in plaintiff's face. Seconds later, there was laughter. Plaintiff was too angry to react and was sprayed with incapacitating agents twice more. Plaintiff and his legal property were taken from his cell.

Plaintiff was placed on control segregation for not submitting to defendant Hoddy-Tripp and surrendering his legal materials. When he was on control segregation, plaintiff was kept in a cell for 72 hours wearing only undershorts and socks. For approximately ten days, plaintiff spat up a dark brown substance; on July 2, 2000, a medical examination determined that the substance was blood from plaintiff's internally bruised lungs. Plaintiff filed grievance # SMCI-2000-20358. Defendant Bell dismissed the grievance and did not assess the facts independently.

Plaintiff filed grievance # SMCI-2000-20348, complaining about the restrictions on his possession of legal materials. In dismissing the grievance, defendant Bell misused his position as an institution complaint examiner to justify the staff's actions taken in reliance

on defendant Hoddy-Tripp's allegations in conduct report #1113825. At some point, defendant Berge rejected that conduct report and remanded it to the hearing committee. Because plaintiff never received a new hearing on the conduct report, plaintiff filed grievance # SMCI-2000-21646. Instead of requiring staff to comply with Wis. Admin. Code § DOC 303.96(3), defendant Bell told the hearing officer to take whatever action he deemed appropriate.

The team imposed restrictive cell view on plaintiff's then-assigned cell. Restrictive cell view is a restriction in which an inmate is stripped of all personal property except linen and clothing for a minimum of 14 days. This restriction was imposed because of conduct report # 1113825. Defendants Hoddy-Tripp and Caldwell insisted that they be shown proof of court deadlines before they would return any of plaintiff's legal property to him.

III. DISCRIMINATION ON THE BASIS OF RACE AND LITIGIOUSNESS

On June 29, 2000, defendants Hoddy-Tripp and Caldwell imposed control segregation on plaintiff in violation of Wis. Admin. Code § DOC 303.71. At that time, plaintiff, who is black, lived next to inmate Michael Sciortino, who is white. Plaintiff was assigned to cell # 417 and Sciortino was assigned to cell # 415; they were able to talk through the vent between their cells. Plaintiff was on control segregation in his underwear and in a stripped cell for refusing to surrender his legal materials. Sciortino was on control

segregation in his underwear and in a stripped cell for spitting in the face of an officer and for attacking staff. Plaintiff and Sciortino discussed asking for clothing, blankets and hygiene products from defendant Caldwell. Defendant Caldwell released Sciortino and did not release plaintiff. Plaintiff asked defendant Caldwell if she had released Sciortino and not him because of racism; Caldwell responded, "I'm not answering that question." Sciortino was released from control segregation after approximately 24 hours. Plaintiff spent 72 hours in control segregation, during which time he was in his underwear in a stripped cell, was not provided hygiene products and was fed segregation or nutragrain loaves. Plaintiff filed grievance # SMCI-2000-19847. Defendant Bell downplayed the issue and dismissed plaintiff's complaint of discrimination.

On June 29, 2000, plaintiff was given a fourteen-day sanction that restricted his access to his legal materials and all other property except clothing and linens. The sanction was imposed because plaintiff allegedly covered his cell window. Inmate Al-Alamin Akbar, an African-American, was accused of covering his cell window and was given the same sanction as plaintiff. Inmate Gerald L. Pearson, who is white, received a conduct report for restricting the view into his cell but was not stripped of his property. Defendant Hoddy-Tripp ordered Sgt. Bowedy to write Pearson a conduct report. Plaintiff filed grievance # SMCI-2000-22166, alleging that he was placed on restrictive cell view because he is black; defendant Bell ignored the overt racism.

Supermax Correctional Institution has no non-white staff. More than three-quarters of the inmates at Supermax Correctional Institution are black; the other quarter are Latino, Native American and other groups. Plaintiff was the spokesperson for grievance # SMCI-2001-3549. Defendant Biggar alleged that plaintiff had forged over 115 inmates' signatures.

IV. BEHAVIOR MODIFICATION PROGRAMMING

Inmates at Supermax Correctional Institution are isolated from other human beings. Human contact is limited to situations in which medical staff, clergy or counselors stop in front of the inmate's cell during rounds. Physical contact is limited to being touched through a security door by a correctional officer while the inmate is being placed in restraints or having restraints removed. Most verbal communication with staff occurs through intercom systems; most verbal communication with other inmates occurs through the vent between cells. Cameras, remote listening devices and control devices for television, water and lights minimize human contact.

Plaintiff is subject to a "level system" that is a behavior modification program regulating almost every dimension of every inmate's life at Supermax Correctional Institution. The system controls visitation; phone calls; ordering and receipt of books, newspapers, pamphlets, magazines and other packages; personal belongings; television viewing; religious, educational and clinical programming; visual stimuli; library privileges;

and many other facets of daily existence within the prison, including the length of time that an inmate stays at Supermax Correctional Institution.

Upon arrival at Supermax Correctional Institution, each inmate is placed in unit Alpha for approximately 30 days. When an inmate is demoted, he is returned to unit Alpha and to level one for either 30, 45 or 60 days. Each level one retention period is a minimum time limit and does not decrease on the basis of an inmate's good behavior when he was on higher levels or the minimal nature of the infraction for which an inmate has been demoted. Level one conditions include non-visual stimuli that fluctuate at staff's discretion; no electronics; no library privileges; no legal books; one holy book; one standard dictionary; no photocopies of religious material or caselaw; no clinical programming; no photographs; reduced canteen privileges; reduced telephone privileges; no religious services; and reduced human contact. To advance through the level system, inmates must avoid disciplinary infractions, enroll in level 2, 3, 4 and 5 programming and engage in "staff/inmate interaction." If an inmate does not volunteer for level programming he is either kept at level two or demoted to level one. Whether an inmate has met the requirements to advance through the level system is evaluated subjectively by prison staff. According to defendant Hompe, the goal of the level system is "to promote personal growth, a positive attitude and socially acceptable behavior."

Plaintiff has spent all of 2001 and 288 days in 2000 on level one. Plaintiff believes

the system is designed intentionally to cause prisoners psychological and emotional damage. The level system operates in a subjective and unpredictable manner that has caused plaintiff frequent headaches, sleep disturbances, perceptual distortions, illusions, periods of "overt confusional state of mind," anxiety, irritability and malfunctioning thinking, concentration and memory. Sometimes plaintiff becomes fixated on one thing or another and lives in constant fear as a result of his conditions of confinement.

The level system has no security connotations and is imposed solely to force behavior modification by depriving plaintiff of property and privileges. Most of the "privileges" that are parceled out by progression through the system are things that are available to inmates as a matter of right, such as legal and religious books and materials that do not threaten security. There is no security or penological reason to deny plaintiff photographs of his children, friends and family or his reading materials. There is no security or penological reason to deny an inmate an opportunity to advance through the level system because he fails to participate voluntarily in a generalized level program without adequate clinical staffing to monitor probable regression or post traumatic stress disorder. Level one is fundamentally unfair and punitive in nature. Plaintiff filed grievance # SMCI-2000-31788, complaining that he had been deprived of his property and privileges in order to force behavior modification. Plaintiff filed grievances # SMCI-2000-2870, # SMCI-2000-7943, # SMCI-2000-18071 and # SMCI-2000-18746 challenging defendants Hoddy-Tripp,

Hompe and Berge's policies and practices governing level one and unit Alpha.

V. DUE PROCESS

When prisoners are transferred to Supermax Correctional Institution, they are told that they will stay there a minimum of 18 months before they will be considered for a return to another prison's general population. Because prison officials have set an 18-month minimum, defendants' imposition of a program review hearing under § DOC 302 or administrative confinement hearings is not impartial. When plaintiff tried level 2 programming, he told defendant Berge that the programs failed to teach him rehabilitation skills. On February 19, 2001, defendant Huibregtse responded by writing,

> [Y]our reluctance to participate in programming is discouraging. You can choose to participate in available programming to help you examine the life choices that brought you where you are today or you can 'choose' to be resistive. . . .[A] request for any transfer will not have our support.

There is no maximum limit on the amount of time an inmate may spend at Supermax Correctional Institution or is subject to level one conditions.

Plaintiff filed grievance # SMCI-2000-31788; defendant Bell dismissed plaintiff's partiality argument. Plaintiff filed grievance # SMCI-2000-25915 against defendant Bell, complaining about his inadequate performance as an institution complaint examiner. Defendant Bell presided over the grievance against him. Defendant Biggar presided over a

separate grievance against her. Together with 40 other inmates, plaintiff filed grievance # SMCI-2000-16098, complaining that the inmate complaint review system holds grievances for too long and misappropriates grievances to prevent inmates from exhausting their administrative remedies as a prerequisite to gaining court access.

VI. INTERFERENCE WITH MAIL

On December 15, 1999, defendants promulgated a policy requiring all inmates to submit their mail unsealed. If a prisoner submitted his mail sealed, it would not be processed. Because of the policy, plaintiff has had mail to non-inmate, non-privileged (i.e. non-legal) people rejected for no penological reason. On March 13, 2000, defendant Hoddy-Tripp rejected letters plaintiff had sent to his son and daughter in a single envelope because she said the letters had to be sent separately. On May 1, 2000, defendant Hoddy-Tripp rejected plaintiff's letter to his daughter, in which he had drawn a picture of a dog, stating only that the letter was "disallowed." On May 18, 2000, defendant Hoddy-Tripp rejected plaintiff's letter addressed to "Wisconsin N.E.T. Ms. Gail Griffin - Attn: Secretary" because it was third party correspondence. On June 5, 2000, Officer Hassell returned another letter from defendant Hoddy-Tripp saying that it was "disrespectful to staff." Plaintiff's mail has also been rejected when plaintiff has used his Muslim name. Plaintiff filed grievances # SMCI-2000-16956, # SMCI-2000-796, # SMCI-2000-8309 and # SMCI-2000-16137

complaining about the open mail policy. After plaintiff filed grievance # SMCI-2000-796, the policy was modified to allow inmates to submit privileged (legal) correspondence sealed.

DISCUSSION

Many of plaintiff's allegations state no valid claim on their face so I will not address those allegations. For example plaintiff alleges that he filed many grievances that were dismissed. To the extent a dismissal can be attributed to retaliation, it will be addressed; however, the mere allegation that plaintiff filed a grievance that was dismissed states no claim for relief. Plaintiff has divided his complaint into six claims: (1) retaliation for seeking judicial redress; (2) excessive force in violation of the Eighth Amendment; (3) discrimination against plaintiff because of his race and being litigious in violation of the equal protection clause; (4) behavior modification programming in violation of the First and Fourteenth Amendments; (5) length of confinement at Supermax Correctional Institution and on level one status in violation of the due process clause; and (6) unlawful interference with inmate mail in violation of the First Amendment. Each count identified by plaintiff contains claims based on several constitutional amendments and state statutes and regulations. Because plaintiff has identified clearly the claims he wishes to bring, I will not interpret allegations as stating claims not argued by plaintiff. However, because many of the

allegations plaintiff makes on his retaliation claim appear to be part of an additional argument that defendants Hoddy-Tripp, Caldwell and Biggar deprived him of access to the courts in violation of the First Amendment, I will address that claim separately.

I. RETALIATION

Plaintiff alleges that defendant Hoddy-Tripp retaliated against him in several ways, including by holding and destroying his legal property, interfering with documents he tried to pass through the prison legal route, making it difficult for him to litigate cases, writing conduct reports for which he was disciplined, imposing excessive sanctions for minor rule infractions and creating a management tool designed specifically to move him frequently from cell to cell. For example, plaintiff contends that defendant Hoddy-Tripp issued him a conduct report in retaliation for plaintiff's telling inmate Johnson that Johnson had legal standing to refuse tuberculin testing and that defendant Hoddy-Tripp reassigned plaintiff to cells frequently in retaliation for seeking judicial redress. Plaintiff contends that defendant Hoddy-Tripp took these actions solely to harass him and in retaliation for his litigiousness. Plaintiff alleges that most of the retaliation occurred in response to complaints or grievances he had filed.

Although plaintiff has no constitutional right not to have sanctions imposed by defendant Hoddy-Tripp, those restrictions cannot be imposed in retaliation for the exercise

of a constitutional right. See Babcock v. White, 102 F.3d 267, 274 (7th Cir. 1996). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, plaintiff need not present direct evidence in the complaint; however, he must "'allege a chronology of events from which retaliation may be inferred.'" Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quoting Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985)). It is insufficient to allege the ultimate fact of retaliation. See Benson, 761 F.2d at 342. In addition, the facts alleged must be sufficient to show that absent a retaliatory motive, the prison official would have acted differently. See Babcock, 102 F.3d at 275.

> [T]he retaliation inquiry should be undertaken in light of the "general tenor" of Sandin, which "specifically expressed its disapproval of excessive judicial involvement in day-to-day prison management." Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995). "[W]e should 'afford appropriate deference and flexibility' to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." Id. (citing Sandin v. Conner, 515 U.S. 472, 482 (1995)).

Id.

Plaintiff contends that defendants took various actions against him in retaliation for his filing of grievances and complaints. However, plaintiff alleges also that he filed numerous grievances and made numerous complaints during the relevant time period. From previous cases plaintiff has filed in this court, I note that he has filed a similarly large number of grievances and complaints over the past several years. Under these circumstances, there is no chronology of events from which retaliation can be inferred; because plaintiff is

constantly filing grievances and complaints, the fact that he was placed on level one status or that a different restriction was imposed shortly after filing a grievance or complaint does not suggest a causal relationship. Plaintiff has failed to state a claim of retaliatory treatment and will be denied leave to proceed in forma pauperis on his retaliation claim.

I understand plaintiff to contend also that defendant Hoddy-Tripp violated his rights under the First Amendment when she refused to allow plaintiff to litigate other inmate's cases or to return their legal property and when she sanctioned him for providing legal advice to other inmates. An inmate does not have "a First Amendment right to provide legal advice that enhances the protections otherwise available under Turner [v. Safley, 482 U.S. 78 (1987)]." Shaw v. Murphy, 121 S. Ct. 1475, 1478 (2001). In Turner, the Court "held that restrictions on inmate-to-inmate communications pass constitutional muster only if the restrictions are reasonably related to legitimate and neutral governmental objectives." Shaw, 121 S.Ct. at 1478. Plaintiff was subject to restrictive conditions that limited his contact with other inmates. The Supreme Court's opinion in Shaw clarifies that plaintiff has no stand-alone constitutional right to give other inmates legal advice. Therefore, even if plaintiff could show a chronology of retaliation, he has failed to state a claim upon which relief may be granted as to his providing legal advice because any retaliation was not in response to a constitutionally-protected action by plaintiff.

Plaintiff contends also that he has a right not to be subjected to "arbitrary use of

authority" and not to be harassed by defendant Hoddy-Tripp. Allegations of verbal threats and harassment do not establish a constitutional claim. See Patton v. Przybylski, 822 F.2d 697, 700 (7th Cir.1987) (derogatory remarks do not constitute a constitutional violation); McDowell v. Jones, 990 F.2d 433, 434 (8th Cir.1993) (verbal threats and name calling directed at inmate not actionable under § 1983); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (prison official's use of vulgar language did not violate inmate's civil rights); Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985) (verbal threats by correctional officer do not amount to constitutional violation). Plaintiff will be denied leave to proceed on his claim of retaliation against defendant Hoddy-Tripp.

II. ACCESS TO THE COURTS

Many of the allegations plaintiff makes in support of his retaliation claim can be interpreted as raising a claim that he is being denied access to the courts. I understand plaintiff to contend that defendants Hoddy-Tripp and Caldwell violated his right to access the courts when they insisted that they be shown proof of court deadlines before they would return any of plaintiff's legal property to him. Plaintiff contends also that defendant Biggar violated his right of access to the courts by monitoring plaintiff's condition of confinement cases. Plaintiff contends that photocopies of legal materials do not breach security in any way because they do not contain escape plans, promote gang activity, threaten bodily harm,

extort money or blackmail.

It is well established that inmates have a fundamental constitutional right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 821 (1977). To state a claim, the prisoner must allege facts from which an inference can be drawn of "actual injury." See Lewis v. Casey, 518 U.S. 343, 349 (1996). This rule is derived from the doctrine of standing, see id., and requires the prisoner to demonstrate that a non-frivolous legal claim has been frustrated or impeded. See id. at 353-54 nn. 3-4 and related text. In light of Lewis, a plaintiff must plead at least general factual allegations of injury resulting from defendants' conduct or suffer dismissal of his complaint for failure to state a claim upon which relief may be granted. Plaintiff has not alleged that he was prejudiced in pursuing a non-frivolous legal claim. Therefore his claim that defendants' control over his legal materials violated his right to access the courts under the First Amendment will be dismissed.

III. EXCESSIVE FORCE

Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations as to the safety threat perceived by

the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. See Whitley v. Albers, 475 U.S. 312, 321 (1986). See also Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984) (internal citations omitted):

> [I]t is a violation of the Eighth Amendment for prison officials to use mace or other chemical agents in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain. . . . The use of mace, tear gas or other chemical agent of the like nature when reasonably necessary to prevent riots or escape or to subdue recalcitrant prisoners does not constitute cruel and inhuman punishment, and this is so whether the inmate is locked in his prison cell or is in handcuffs. . . . [T]he use of nondangerous quantities of the substance in order to prevent a perceived future danger does not violate 'evolving standards of decency' or constitute an 'unnecessary and wanton infliction of pain.'

Plaintiff alleges that on June 29, 2000, defendants Hoddy-Tripp and Caldwell came to his cell prepared to use force to take plaintiff's legal materials after plaintiff covered up his cell front window. Plaintiff alleges that while he was sitting on his bunk going through his legal papers, defendant Caldwell sprayed a chemical agent in his face. When plaintiff failed to react, he was sprayed with agents twice more. Plaintiff alleges that he "vehemently protested the unlawful choice of either having to 'show defendant Hoddy-Tripp proof of court deadline dates' or relinquishing his legal property." Cpt. at ¶ 51. This suggests that he was not passively going through his legal documents in preparation for turning them over to defendants Hoddy-Tripp and Caldwell but that instead, he had given defendants reason

to believe he would not surrender the materials without violence. Plaintiff alleges that the chemical agents bruised his lungs and that he spat up blood for ten days. This suggests that defendant Caldwell may have sprayed more of the chemical agent at plaintiff than was necessary to prevent any perceived danger from plaintiff. Plaintiff will be allowed to proceed against defendants Hoddy-Tripp and Caldwell on his claim that defendants used excessive force against him in violation of the Eighth Amendment.

In a related claim, plaintiff contends that defendants Hoddy-Tripp and Caldwell used chemical agents on him in violation of Wis. Admin. Code § DOC 306.06(3)(a-h), which lists the acts by an inmate that allow the use of non-deadly force. Section DOC 306.06(3)(h) states that non-deadly force may be used to enforce an order of a staff member. Plaintiff alleges that he was sprayed with chemical agents after he failed to respond to an order that he give defendants Hoddy-Tripp and Caldwell his legal property or show them a court document indicating that he had a deadline within thirty days. Therefore, plaintiff has failed to state a claim upon which relief may be granted under Wis. Admin. Code § DOC 306.06(3).

IV. EQUAL PROTECTION CLAUSE

A. Racial Discrimination

Plaintiff contends that sanctions imposed on him on June 29, 2000, were more severe

than the sanctions received by white inmates for similar disciplinary offenses. Plaintiff contends also that Supermax Correctional Institution's classification process is implemented in a racially discriminatory manner because more than three-quarters of inmates are black and the other quarter includes Latinos, Native Americans and others.

To show an equal protection violation, a plaintiff must demonstrate intentional or purposeful discrimination. See Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982). A plaintiff seeking relief pursuant to the equal protection clause must allege specific facts supporting an inference that a person of a different race would have been treated more favorably. See Jaffe v. Federal Reserve Bank of Chicago, 586 F. Supp. 106, 109 (N.D. Ill. 1984). Plaintiff's allegations do not support such an inference. Plaintiff alleges that Sciortino, who is white, was released from control segregation after 24 hours, but that plaintiff was kept there for 72 hours. However, plaintiff and Sciortino were placed on control segregation for different offenses and are not situated similarly for purposes of an equal protection analysis. In a separate attempt to show discrimination, plaintiff alleges that he and another black inmate were given a fourteen-day sanction restricting access to their property as the punishment for covering their cell windows but that Pearson, a white inmate, received a conduct report for restricting the view into his cell but was not stripped of his property. Restricting the view into a cell may be different from covering a cell window; in any event, receiving a conduct report instead of a fourteen-day restriction of property may

be a more severe sanction. Plaintiff does not indicate the punishment imposed on Pearson as a result of the conduct report. Plaintiff has failed to allege facts suggesting that he was discriminated against on the basis of his race.

Plaintiff alleges also that racial discrimination at the prison is evidenced by the fact that Supermax Correctional Institution has no non-white staff and that more than three-quarters of the inmates at Supermax are black. Without additional allegations as to the number of non-white staff at other correctional institutions and the ratio of black to non-black inmates that are considered security risks, these allegations do not suggest the presence of unlawful discrimination. In addition, plaintiff alleges only that "Super Max Correctional Institution practices racism in its classification process as the facility is over three-quarters filled with African Americans," Cpt. ¶ 145, and has not named an individual who he believes is responsible for the alleged discrimination. Assuming plaintiff intended this claim to be brought against defendant Warden Berge, he has failed to suggest any reason why defendant Berge would have any control over the race of the inmates who are transferred to Supermax. Plaintiff will not be allowed to proceed on his claim that he was discriminated against on the basis of his race in violation of the equal protection clause of the Fourteenth Amendment.

B. Discrimination on the Basis of Litigiousness

Plaintiff contends that he received harsher sanctions because he is litigious. Plaintiff has not made specific allegations about any inmate who breaks the same rules as plaintiff, is not litigious and receives less harsh sanctions. In any event, this claim is more appropriately brought as one alleging retaliation; I have addressed that claim already. Plaintiff will not be allowed to proceed on his claim that he was discriminated against for being litigious.

V. BEHAVIOR MODIFICATION PROGRAMMING

Plaintiff contends that the behavior modification programming violates his substantive due process rights; I understand this claim to be a claim that the conditions to which he is subject pursuant to the programming are unconstitutional as violations of the Eighth Amendment. In addition, I understand plaintiff to contend that many of the restrictions meted out pursuant to behavior modification programming violate his rights under the First Amendment.

A. Eighth Amendment

Plaintiff contends that the level system is designed to cause prisoners psychological and emotional damage; he challenges the conditions at Supermax Correctional Institution and level one behavior modification programming. The Eighth Amendment imposes a duty

on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. See Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997). Prisoners are entitled to "the minimal civilized measure of life's necessities." Farmer v. Brennan, 511 U.S. 825, 833-34 (1994). To succeed on a conditions of confinement claim, a prisoner must also show that prison officials were deliberately indifferent to his needs. See Dixon, 114 F.3d at 644 (citing Wilson v. Seiter, 501 U.S. 294, 301-04 (1991)). The minimum intent required is "actual knowledge of impending harm easily preventable." Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir.1985). Plaintiff's allegations that human contact is limited and that most facets of his daily existence are controlled by the level system fail to suggest that he is being deprived of "the minimal civilized measure of life's necessities." Plaintiff has the ability to advance through the level system and gain privileges by simply following prison rules. Plaintiff will not be allowed to proceed on a claim that behavior modification programming at Supermax violates his rights under the Eighth Amendment.

To the extent that plaintiff is complaining more generally about conditions at Supermax not related to the level system, he is a class member in Jones v. Berge, 00-C-421-C (W.D. Wis.). Plaintiffs in that case have been allowed to proceed on a challenge to the constitutionality of conditions of confinement at Supermax.

B. First Amendment

I understand plaintiff to contend that many of the restrictions placed on him, including restrictions on his possessing legal and religious books and materials that do not threaten security, violate his rights under the First Amendment. Plaintiff contends that level one is not justified by any penological reason and that this lack of justification renders the system punitive and artificial, breeds disrespect for authority and undermines inmates' relational skills needed for habilitation. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. Even assuming that the restrictions plaintiff complains of impinge on his rights under the First Amendment, he has not shown that such regulations are not related reasonably to legitimate penological interests. Defendant Hompe said that the goal of the level system is "to promote personal growth, a positive attitude and socially acceptable behavior." These rehabilitative goals are legitimate penological interests; that the restrictions may not have the desired effect upon plaintiff does not mean that the regulations are not related reasonably to these goals. Judges must respect the choices made by prison administrators, who need not adopt the best alternatives. See Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1999) (citing Bell v. Wolfish, 441 U.S. 520, 559-60 (1979)). Because plaintiff has failed to state a claim upon which relief may be granted, he will be denied leave to proceed in forma pauperis on his claim that behavior modification programming violates his rights under the First Amendment.

VI. DUE PROCESS

A. Time Spent at Supermax and on Level One

I understand plaintiff to contend that behavior modification programming at Supermax Correctional Institution, and specifically the level system, violates his rights under the due process clause of the Fourteenth Amendment and under various state laws. I understand plaintiff to contend also that his rights under the due process clause of the Fourteenth Amendment are violated by the fact that inmates are transferred to Supermax Correctional Institution for a minimum of 18 months and that there is no maximum limit on the amount of time an inmate may spend at Supermax Correctional Institution or be subject to level one conditions. Plaintiff fails to state a claim upon which relief may be granted because his allegations do not establish that he was deprived of a protectible liberty interest. A procedural due process violation against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protectible liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. See

Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty).

"A prisoner has no due process right to be housed in any particular facility." Whitford v. Boglino, 63 F.3d 527, 532 (7th Cir. 1995); see also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (prisoner has no legally protected interest "in [his] keeper's identity"). Plaintiff has no liberty interest in not being transferred to Supermax Correctional Institution. See, e.g., Whitford, 63 F.3d at 532 ("a transfer to another prison, even to one with a more restrictive environment, is not a further deprivation of an inmate's liberty under the Due Process Clause itself because the prisoner could have been initially placed in a more restrictive institution"). Similarly, he has no liberty interest in not being kept at Supermax Correctional Institution for a minimum of 18 months or in not being subject to level one conditions because such confinement is "well within the terms of confinement ordinarily contemplated by a prison sentence." Hewitt v. Helms, 459 U.S. 460, 468 (1983). See also Smith v. Shettle, 946 F.2d 1250, 1252 (7th Cir.1991) ("a prisoner has no natural liberty to mingle with the general prison population"); Wis. Admin. Code DOC § 308.04 (1998) note ("by providing the review [by the administrative review committee prior to placing an inmate in administrative confinement], the Department does not intend to create any protected liberty interest by using mandatory language"). Because plaintiff has no liberty

interest that has been violated, he has no right to due process before being placed on level one status or before his stay on level one status is continued. Plaintiff has failed to state a claim upon which relief may be granted.

B. Inmate Complaint Review System

Plaintiff contends that the inmate complaint review system deprives him of due process by exceeding the time limits for response set out by state law on a consistent basis. Plaintiff contends that this prevents him from exhausting his administrative remedies, which is a prerequisite to bringing a lawsuit. Wis. Admin. Code § DOC 310.12(3) states, "If the complainant does not receive the decision [of the appropriate reviewing authority] within 23 working days of the [institution complaint examiner]'s receipt of the complaint, the parties shall consider the complaint dismissed and the complainant may appeal immediately." Therefore, plaintiff need never wait more than 23 working days for a response to a grievance before appealing. Sections DOC 310.13(7) and 310.14(3) contain similar provisions stating that an earlier decision is affirmed if the corrections complaint examiner and the secretary fail to recommend a decision within 35 working days and 10 working days respectively. Plaintiff has failed to state a claim upon which relief may be granted that delay in processing grievances has prevented him from exhausting his administrative remedies or from accessing the courts.

Plaintiff contends that the inmate complaint review system "is selective, discriminatorial [sic] and partial." Cpt. at ¶ 173. These allegations are too conclusory to state a claim for relief under the equal protection clause of the Fourteenth Amendment.

Plaintiff complains that defendants Bell and Biggar ruled on grievances complaining about their performance as institution complaint examiners. Plaintiff has no constitutional right to have his inmate complaints ruled on by impartial decisionmakers and he has pointed to no statute that would give him such a right under state law. Plaintiff has failed to state a claim upon which relief may be granted.

VII. MAIL

Plaintiff contends that the prison policy that inmates must submit their mail unsealed violates the First Amendment and has been the subject of abuse. In an order entered January 10, 2001, in Tiggs v. Berge, No. 00-C-317-C (W.D. Wis.), I granted plaintiff's motion for voluntary dismissal of his claim challenging the mail policy. Because I did not specify otherwise, the dismissal of that claim was with prejudice. Therefore, the doctrine of res judicata bars plaintiff from bringing this claim.

Plaintiff alleges also that he has had several pieces of outgoing mail returned to him in violation of the First Amendment. Specifically, plaintiff complains that: (1) letters sent to plaintiff's son and daughter in a single envelope were rejected because the letters needed

to be sent separately; (2) a letter to plaintiff's daughter that included a picture of a dog drawn by plaintiff was rejected as "disallowed"; (3) a letter to "Wisconsin N.E.T. Ms. Gail Griffin - Attn: Secretary" was rejected as third-party correspondence; (4) a letter was rejected because it was "disrespectful to staff;" and (5) letters were rejected for plaintiff's using his Muslim name.

The Supreme Court has held that "it [is] important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Turner, 482 U.S. at 90. Prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests, they engage in " censorship of . . . expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.'" Procunier v. Martinez, 416 U.S. 396, 415 (1974).

The requirements that one envelope may contain only one letter and that plaintiff may not mail items from third parties are neutral reasons for the rejection of plaintiff's letters to his son and daughter and to Griffin. Therefore, plaintiff has failed to state a claim upon which relief may be granted under the First Amendment for defendant Hoddy-Tripp's refusal to mail these letters.

In contrast, plaintiff will be allowed to proceed on his claims as to the letters dated May 1, 2000, and June 5, 2000. Defendant Hoddy-Tripp rejected his May 1, 2000 letter

to his daughter without giving a reason other than that the letter was disallowed. Although defendant Hoddy-Tripp may have had a neutral and non-arbitrary reason for rejecting the letter, that reason is not obvious from plaintiff's allegations. Defendant Hoddy-Tripp's rejection of plaintiff's June 5, 2000 letter was made explicitly on the basis of content. Although plaintiff has no First Amendment right to insult correctional officers to their faces or within the prison, he may have a free speech right to describe them in negative terms in letters to people outside the prison. Plaintiff will be allowed to proceed against defendant Hoddy-Tripp on his claims that his May 1, 2000 letter was disallowed and that his June 5, 2000 letter was rejected because it was disrespectful to staff.

It appears to be an open question in the Seventh Circuit whether prisoner mail may be rejected for the prisoner's use of a Muslim name. See Azeez v. Fairman, 795 F.2d 1296, 1302 (7th Cir. 1986) ("Even in 1986 the right to make prison staff recognize a religiously motivated name change in prison is not clearly established"). The Court of Appeals for the Ninth Circuit reviewed federal courts' responses to cases dealing with inmates' use of religious names, noting that

> [t]he cases have consistently supported three propositions. First, an inmate has a First Amendment interest in using his religious name, at least in conjunction with his committed name. Second, an inmate cannot compel a prison to reorganize its filing system to reflect the new name. Third, in states where inmates are allowed to change names legally, prisons are generally required to recognize only legally changed names.

Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995) (internal citations omitted). In Malik, the court held that "the law regarding a prisoner's First Amendment right to use his new legal name in conjunction with his committed name was clearly established in 1990." Id. at 730. Other courts of appeals have agreed. See Salaam v. Lockhart, 905 F.2d 1168 (8th Cir. 1990) (holding that the state authorities must deliver mail to prisoner addressed to him only as his legally-changed name and not his committed name; not addressing whether prisoner could send mail bearing only his legally changed name); Felix v. Rolan, 833 F.2d 517 (5th Cir. 1987) (holding First Amendment not violated in situation in which "prison has not refused to recognize Al Uqdah's new name, it merely requires that for administrative efficiency he include his former name as an identifying alias"); Barrett v. Commonwealth of Virginia, 689 F.2d 498, 503 (4th Cir. 1982) ("it would be unlawful for Virginia to refuse to deliver mail addressed to a prisoner under his legal religious name"; not addressing whether prisoner could send mail bearing only his legally changed name).

I assume that plaintiff has legally changed his name, as he alleged in a separate lawsuit filed in this court, and I assume that plaintiff used his new legal name, A'Kinbo Jihad-Suru Hashim, and not the Islamic translation of his convicted name, Yahya. However, plaintiff does not allege that he used both his committed and legally changed names or that his letters were rejected even though his committed name was on them. Although plaintiff's letters may not be rejected because he used his new legal name, they may be rejected for his failure

to include his committed name. Prisons have a legitimate interest in protecting the public by insuring that recipients of mail from inmates are able to recognize who the mail is from. Plaintiff has failed to state a claim upon which relief may be granted under the First Amendment for the rejection of his outgoing mail bearing only his Muslim name.

VIII. STATE CLAIMS

The only federal claims on which plaintiff will be granted leave to proceed are his claims that defendants Hoddy-Tripp and Caldwell used excessive force against him in violation of the Eighth Amendment and that defendant Hoddy-Tripp rejected some of his outgoing mail in violation of the First Amendment. I have already addressed the one state claim that plaintiff raised in relation to his excessive force claim. Because none of plaintiff's other claims under state law arises out of the same case or controversy as the two claims over which the court has original jurisdiction, I decline to exercise supplemental jurisdiction over plaintiff's state law claims. See 28 U.S.C. § 1367.

ORDER

IT IS ORDERED that

1. Plaintiff John D. Tiggs, Jr.'s motion for leave to proceed in forma pauperis on his claim that defendants Linda Hoddy-Tripp and Captain Caldwell used excessive force against

him in violation of the Eighth Amendment is GRANTED;

2. Plaintiff's motion for leave to proceed in forma pauperis on his claim that defendant Hoddy-Tripp refused to mail letters he wrote on May 1, 2000 and June 5, 2000 is GRANTED;

3. Plaintiff's motion for leave to proceed in forma pauperis on all other federal claims is DENIED for his failure to state a claim upon which relief may be granted;

4. Defendants Gerald A. Berge, Peter Heibregtse, Bradley Hompe, John Bell and Julie M. Biggar are DISMISSED from this case.

Entered this 29th day of May, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge