IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DANIEL HARR,

OPINION AND ORDER

Plaintiff,

01-C-0159-C

v.

JON E. LITSCHER, individually and in his official capacity as Secretary of the State of Wisconsin Department of Corrections; DANIEL BERTRAND, individually and in his official capacity as Warden of the Green Bay Correctional Institution; BARBARA STAUDENMAIER, individually and in her official capacity as Program Review Coordinator, Green Bay Correctional Institution; NOVITSKI, in his/her individual capacity; THOMAS DONOVAN, in his individual capacity; and DELVAUX, in his/her individual capacity;

Defendants.

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This is a civil action for injunctive, declaratory and monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Daniel Harr, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, contends that defendants violated his First Amendment rights by interfering with his ability to send and receive his literary works and retaliated against him by transferring him to Supermax. In an order entered May 30, 2001, plaintiff was granted leave to proceed on these claims. Subject matter jurisdiction is present

under 28 U.S.C. § 1331.

Presently before the court is defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) in which defendants argue that (1) plaintiff failed to exhaust administrative remedies on two claims; (2) defendants are entitled to qualified immunity on three claims; and (3) plaintiff's retaliation claim is barred by Heck v. Humphrey, 512 U.S. 477 (1994), and Zinermon v. Burch, 494 U.S. 113 (1990). On August 1, 2001, this court entered an order instructing plaintiff that he was not required to respond to two other arguments made in defendants' motion to dismiss. First, plaintiff was instructed that he need not respond to defendants' argument that any limitations they placed on plaintiff's ability to send or receive mail were reasonably related to legitimate penological interests because such an argument must be made on a motion for summary judgment or at trial; it cannot be determined from the complaint whether defendants were justified in restricting plaintiff's mail privileges. Second, plaintiff was instructed that he need not address defendants' argument that defendants Litscher and Bertrand lack personal involvement in the alleged First Amendment violations. In the orders of May 30, 2001 and June 22, 2001, plaintiff's complaint was screened pursuant to 28 U.S.C. § 1915A, at which time I concluded that it was appropriate for plaintiff to proceed against defendants Litscher and Bertrand.

Because plaintiff has not exhausted his administrative remedies with respect to the specific claim that his novel, Strangers, was confiscated improperly, I will grant defendants'

motion to dismiss this claim. Plaintiff has exhausted his administrative remedies on his claim of general mail interference; therefore I will deny defendants' motion to dismiss on this claim. Because defendants have qualified immunity as to three claims, defendants' motion to dismiss plaintiff's claims that he was denied personal photocopies, multiple copies of incoming documents and contracts to engage in a business enterprise will be granted. In addition, although the Heck doctrine will bar plaintiff's First Amendment claims related to the Oshkosh conduct report as to § 1983 damages only, defendants' motion to dismiss plaintiff's retaliation claim will be denied.

For the sole purpose of deciding this motion to dismiss, plaintiff's allegations in the complaint are accepted as true.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Daniel Harr is an inmate at the Supermax Correctional Institution. At the time of the events at issue in this cause of action, plaintiff was an inmate at the Green Bay Correctional Institution. Defendant Jon E. Litscher is the secretary of the Wisconsin Department of Corrections. The remaining defendants are employed at the Green Bay Correctional Institution: defendant Daniel Bertrand is the warden; defendant Barbara Staudenmaier is the program review coordinator; and defendants Thomas Donovan,

Novitski and Delvaux are members of the program review committee.

B. Oshkosh Correctional Institution

Plaintiff has been incarcerated by the state of Wisconsin since August 12, 1997. Before his incarceration, plaintiff spent almost two years in the forensic unit at the Mendota Mental Health Institution. Psychologists who evaluated and treated plaintiff at Mendota diagnosed him with post-traumatic stress disorder and a borderline personality disorder.

Plaintiff was incarcerated at Oshkosh Correctional Institution from April 6 to September 17, 1999. Plaintiff's custody rating when he arrived at Oshkosh was "medium." After arriving at Oshkosh, plaintiff spoke with a number of inmates who had returned from placement outside of Wisconsin, many of whom described the widespread mistreatment and abuse of Wisconsin inmates by staff at out-of-state institutions.

On May 12, 1999, plaintiff drafted a letter to a newspaper reporter for the Wisconsin State Journal in which he mentioned ten instances of alleged abuse or mistreatment of Wisconsin prisoners in out-of-state facilities that had been reported to him by other inmates. Specifically, plaintiff stated that he had been told that Wisconsin prisoners placed out-of-state were not receiving needed treatment and other rehabilitation programs, adequate diet, medical care and recreational opportunities; the institutions did not allow Wisconsin prisoners to keep radios, television and other personal property items; verbal and physical

abuse by staff was widespread; staff used tear gas and pepper spray wantonly on Wisconsin inmates; that staff lost or stole inmate mail frequently; staff sold drugs and liquor to some inmates; and other abuses were occurring. In the letter, plaintiff asked for an investigation of the allegations. Plaintiff provided the name of an inmate who had witnessed these abuses and stated that the inmate was willing to speak to the reporter or other investigators about the concerns raised. Plaintiff indicated that he intended to send a copy of the letter to Wisconsin State Senator Fred Risser.

On May 12, 1999, plaintiff took his letter to the librarian at Oshkosh for copying. Upon reading the letter, the librarian confiscated it and turned it over to Oshkosh security. On May 19, 1999, Security Captain Martin Schroeder placed plaintiff in temporary lockup and told plaintiff that he was locking plaintiff up "pending investigation" of possible discipline for writing the letter to the Wisconsin State Journal reporter. On May 21, 1999, plaintiff filed a complaint against Schroeder for wrongfully placing him in temporary lockup. On May 22, 1999, Schroeder placed plaintiff in isolated segregation and told plaintiff that he had read plaintiff's complaint. On June 1, 1999, Schroeder filed a conduct report against plaintiff, alleging that plaintiff had committed a major violation of § DOC 303.271, which prohibited "lying about staff."

On June 9, 1999, a disciplinary hearing was held before the adjustment committee on the conduct report filed by Schroeder. At the hearing, plaintiff admitted that he had

written the letter to the news reporter and told the committee that his conduct was protected by the First Amendment. Another inmate testified that he had given plaintiff some of the information that plaintiff had put in the letter, that plaintiff's letter was 80% accurate and that he had given plaintiff permission to use his name in the letter. The adjustment committee concluded that plaintiff had made false statements about staff with the intent of making those statements public. The committee found that the statements "could harm staff morale, staff reputation and Department [of Corrections] integrity." The committee found plaintiff guilty of a major rule violation and sentenced him to eight days in adjustment segregation and 180 days in program segregation. Plaintiff filed a timely appeal of the adjustment committee's determination and sentence, citing several court decisions in support of his position that the letter was protected by the First Amendment. On June 23, 1999, Warden Smith affirmed the decision of the adjustment committee.

On July 2, 1999, plaintiff filed an inmate grievance in which he alleged errors in the adjustment committee process.

On July 7, 1999, plaintiff appeared before the program review committee for an annual review of his placement. On July 22, 1999, the committee issued a written decision recommending that plaintiff's security classification be increased from medium to maximum because of his conviction of misconduct for writing the letter to the newspaper reporter. Pursuant to the committee decision, plaintiff was transferred to the maximum security

prison in Green Bay, Wisconsin on September 17, 1999.

On September 8, 1999, the parole commission rejected plaintiff for parole in part because of the "serious major misconduct" violation. The commission deferred plaintiff's parole eligibility date for one year.

On September 15, 1999, plaintiff wrote to Classification Director Stephen Puckett, complaining about "an overwhelmingly large number of inmates [at Oshkosh] being [program review committee]'d back to max[imum]." Plaintiff complained that "[Oshkosh] staff are going overboard with their disciplinary procedures" and overreacting to "conduct that, by sane and rational people, could not be classified as posing a security risk or threat." Plaintiff warned that the excessive discipline was creating anger and resentment among inmates that would result in more serious disciplinary problems.

C. Green Bay Correctional Institution

While plaintiff was at Green Bay Correctional Institution, defendant Bertrand and other members of the prison administration intercepted his mail frequently and confiscated his poetry, fiction and opinion pieces. After plaintiff learned that he was not receiving mail that had been sent to him, he initiated an investigation with the Green Bay Post Office in November 1999.

On October 26, 1999, plaintiff filed an inmate complaint, # GBCI-1999-61540,

alleging that the Green Bay library had refused unlawfully to make photocopies of his creative writing works so that he could send the copies to prospective publishers. On October 29, 1999, defendant Bertrand dismissed plaintiff's complaint. On November 9, 1999, plaintiff requested review by Secretary Litscher of defendant Bertrand's decision. On November 17, 1999, defendant Litscher's office upheld defendant Bertrand's dismissal of plaintiff's complaint.

On October 29, 1999, plaintiff filed a lawsuit, Case No. 99-C-1274, in the United States District Court for the Eastern District of Wisconsin against the Department of Corrections, the warden of Oshkosh Correctional Institution, Security Captain Schroeder and members of Oshkosh program review committee. In the lawsuit, plaintiff alleged that the Oshkosh defendants had violated plaintiff's First Amendment right to freedom of speech when they disciplined him for attempting to send a letter to the Wisconsin State Journal and Senator Risser. This lawsuit was pending at the time the decision was made to transfer plaintiff to Supermax.

On or about December 2000, plaintiff filed an appeal with the Wisconsin Court of Appeals of the circuit court's dismissal of his petition for a writ of certiorari against the warden at Waupun Correctional Institution concerning matters that occurred in 1998.

In January 2000, plaintiff requested an early program review so that he could be considered for reclassification from maximum to medium security. Plaintiff's social worker

at Green Bay wrote to the program review committee in support of plaintiff's request to be transferred to a medium security institution. The psychologist who was the clinical supervisor at Green Bay and who was treating plaintiff for his post-traumatic stress disorder wrote a letter to the committee on plaintiff's behalf "strong[ly] support[ing]" plaintiff's security reclassification request and recommending plaintiff for admission to the Veterans Post-Traumatic Stress Disorder program that was available only at a medium security institution.

On January 14, 2000, defendant Bertrand wrote to plaintiff to tell him that some of plaintiffs' writings, publishing contracts and other materials constituted "contraband" in violation of Department of Corrections rules and would not be returned. Defendant Bertrand did not return certain materials, such as a novel plaintiff had written, entitled Strangers, and literary publications containing advertisements. On January 15, 2000, plaintiff wrote defendant Bertrand to request reconsideration and to report that he was concerned because he had learned that some of the mail being sent to him was not being delivered or was being delivered late. Plaintiff told defendant Bertrand that he had initiated an investigation with the Green Bay Post Office. On January 21, 2000, defendant Bertrand responded to plaintiff that some of the items withheld would be returned to him but that he would not be allowed multiple copies of any materials, that Strangers would not be returned to plaintiff because it contained "pornographic material" and that publications about writing

contests awarding prizes would be withheld. Plaintiff responded by letters dated January 24, 27 and 28, pointing out that no existing rules prohibited sending or receiving multiple copies of materials and explaining that the material defendant Bertrand objected to in Strangers was not prohibited under Department of Corrections regulations. Plaintiff asserted that he needed multiple copies of his work to send to prospective publishers and that in his opinion, writing contests with prizes awarded on the basis of the quality of the work submitted did not constitute "gambling or gaming" within the meaning of the Department of Corrections regulation. On February 2, 2000, plaintiff filed a complaint, GBCI-2000-3682, stating that his mail was being monitored improperly and that his novel, Strangers, was confiscated improperly.

On February 8, 2000, plaintiff wrote to defendant Bertrand to ask why Bertrand had not responded to his last three letters. On February 14, 2000, defendant Bertrand responded in writing to plaintiff, rejecting his request for reconsideration.

On January 22, 2000, plaintiff wrote to Stephen Puckett, asserting that he had received a conduct report at Oshkosh in retaliation for writing to the Wisconsin State Journal and Senator Risser. On January 26, 2000, the program review committee, consisting of defendants Staudenmaier, Novitski, Delvaux and Donovan, decided to maintain plaintiff in the maximum security classification at Green Bay. That same day, plaintiff wrote to Puckett, alleging retaliation by the program review committee in deciding not to reclassify

plaintiff to a medium security classification. On January 27, 2000, plaintiff's social worker told plaintiff that he had spoken to defendant Staudenmaier about the program review committee's denial of plaintiff's request for reclassification and that defendant Staudenmaier had said that she was not disposed favorably toward plaintiff because she believed he was "undermining the system" with the letters he sent to newspapers and other people.

On January 27, 2000, plaintiff sent a letter to various Wisconsin television news producers in which he criticized the state's program of transferring inmates to out-of-state facilities. In the letter, plaintiff asserted that out-of-state placement of inmates did not save money. He also questioned whether Department of Correction officials owned stock in the privately held Corrections Corporation of America, questioned why the department had never been audited and complained about inmate abuse in the Wisconsin prison system.

On January 28, 2000, Green Bay Correctional Institution served plaintiff with a notice of non-delivery of mail form, telling him that two items of mail from World Wide Writers and Writers' Forum would not be delivered to him because they contained entry forms for writing competitions that awarded cash prizes. Green Bay disallowed delivery of these items of mail as contraband. On February 28, 2000, defendant Bertrand dismissed plaintiff's complaint. On March 9, 2000, plaintiff appealed defendant's decision, arguing that department rules against "gambling and gaming" did not apply to contests, like the writing contests at issue, in which prizes were awarded for skill. On March 19, 2000, the

secretary's office upheld defendant Bertrand's decision.

On February 10, 2000, plaintiff wrote to Puckett, stating that he had reason to believe that the program review committee's denial of his security reclassification request was in retaliation for his exercise of his First Amendment rights.

On February 14, 2000, defendant Bertrand issued new mail room policies that prohibited inmates from receiving multiple copies of documents through the mail and limited the number of personally created works that inmates could send or receive in the mail.

On February 15, 2000, plaintiff responded in writing to defendant Bertrand's refusal to reconsider his decision restricting plaintiff's ability to mail his literary works to publishers, to compete in writing contests with cash prizes and to contract with publishers for publication of his literary works. Plaintiff said that he had written about this "to several newspaper reporters who are investigat[ing] the system's failure to assist in someone's rehabilitation" and that defendant Bertrand would have to "address the issue again when it comes time for your attorney to file briefs in the suit I am planning for the first amendment violations that have been perpetrated against me."

On February 16, 2000, plaintiff wrote to defendant Litscher, complaining that defendant Bertrand "has been doing everything possible to prevent [him] from having [his] fiction and poetry published" and that Bertrand's efforts were contrary to department rules

and the Constitution. Plaintiff asked defendant Litscher to investigate the problem and told Litscher that he was sending copies of his letter to state legislators, the media and his lawyer.

On February 16, 2000, plaintiff filed an inmate complaint about defendant Bertrand's change of mailroom procedures. Plaintiff asserted that defendant Bertrand's new procedures were a "personal attack against [him]" and violated § DOC 303.32(1b), ch. DOC 309 and the First Amendment.

On February 17, 2000, plaintiff filed an inmate complaint in which he alleged that six packages of his stories and related documents that had been mailed to him by publishers were not returned to him by prison staff because of defendant Bertrand. Plaintiff alleged that he had not received the parcels or a notice of non-delivery. Plaintiff noted that the parcels had arrived at the institution before defendant Bertrand issued the new mailroom policies. On February 18, 2000, plaintiff filed a "notice to amend complaint" in which he stated that he had received a "property receipt/disposition" form listing five of his six packages as "Duplicates not allowed." Because the rejected documents were unpublished copies of his own work, plaintiff asserted his "unmitigated right to create and seek publication of his own works."

On February 19, 2000, plaintiff wrote defendant Bertrand to protest the new policy on mailing of works written by inmates for publication. Plaintiff suggested that the warden read certain Supreme Court opinions and an opinion of the Wisconsin Court of Appeals and

requested the immediate release of his five packages. Plaintiff stated, ". . . I am strongly suggesting (for your own legal well-being that you immediate[ly] cease and desist from any further improper delay or denial of my mail and works in progress. . . I can promise you this: You WILL lose this issue in a court of law and if the DOC attorneys have advised you otherwise they are placing you personally into a position of strong liability." (Emphasis in original.)

On February 28, 2000, defendant Bertrand signed a decision rejecting one of plaintiff's inmate complaints concerning the institution's refusal to deliver correspondence and publications to plaintiff. On February 29, 2000, defendant Bertrand responded to plaintiff by letter, stating that he would not reconsider his previous determinations.

On March 2, 2000, plaintiff wrote letters to the editors of various Wisconsin newspapers, alleging that the department was using out-of-state transfers of prisoners as punishment and as a means of ridding Wisconsin of inmates who were speaking out and filing lawsuits complaining of abuses of their rights by the department. In the letters to the editors, plaintiff stated, "Recently, I have been targeted by the DOC and administration of the Green Bay Correctional Institution because of my efforts to be a published writer."

On March 3, 2000, defendant Bertrand wrote to plaintiff in response to plaintiff's letters to Puckett, telling plaintiff that his publication efforts would remain subject to the rules and guidelines. Defendant Bertrand concluded his letter by stating, "It is unfortunate

that you continue to have problems adjusting to a maximum-security environment and the rules and policies within this institution."

In February and March 2000, plaintiff filed five other inmate complaints pertaining to the withholding of his mail. Plaintiff filed the complaints on February 2, 2000 (GBCI-2000-3827), February 21, 2000 (GBCI-2000-5381 and GBCI-2000-5382), March 6, 2000 (No. GBCI-2000-6831) and March 15, 2000 (GBCI-2000-7815). They were dismissed by defendant Bertrand on February 28, 2000, March 7, 2000, March 13, 2000 and March 20, 2000, respectively. Plaintiff appealed all of defendant Bertrand's decisions to defendant Litscher, who upheld the decisions of defendant Bertrand on March 19, 2000, April 5, 2000 and April 10, 2000. In several of his complaints and appeals to defendant Litscher, plaintiff threatened legal action if his complaints were dismissed.

On March 7, 2000, Mark Zimonick, a social worker at Green Bay Correctional Institution, submitted a report on plaintiff for use by the program review committee in reviewing plaintiff's custody level and placement. Zimonick recommended that plaintiff be transferred to Supermax. Zimonick knew or should have known that plaintiff did not have a history of violent behavior toward staff or other inmates while in the Wisconsin prison system, that plaintiff was not a leader or a member of a gang and that plaintiff did not pose an unusual escape risk. Zimonick knew or should have known that plaintiff had a history of diagnoses of mental health disorders, including post-traumatic stress disorder, and that

plaintiff had been committed to the Mendota Mental Health Institute.

On April 25, 2000, the program review committee at Green Bay Correctional Institution, consisting of defendants Staudenmaier, Novitski, Delvaux and Donovan, assigned plaintiff to Supermax. In reaching its decision, the committee considered the conduct report for "lying about staff" for which plaintiff was found guilty at Oshkosh. Jefferey Jaeger, security director at Green Bay Correctional Institution, had referred plaintiff to the program review committee for consideration for placement at Supermax. Jaeger's recommendation was a determining factor in the committee's decision to assign plaintiff to Supermax. Jaeger told the committee that plaintiff was at risk for his personal safety at Green Bay Correctional Institution because of his previous employment as a federal correctional officer. Jaeger knew or should have known that plaintiff had not received any adverse treatment from fellow inmates and was not at risk of harm because of his employment history in the Wisconsin prison system.

The Department of Corrections' policy provides that mentally ill inmates are not to be transferred to Supermax and that inmates are to be screened for mental illness before being transferred there. Terry Jorgenson, a Green Bay Correctional Institution staff psychologist, cleared plaintiff for transfer to Supermax without examining or interviewing him despite his knowledge of documents that indicated plaintiff's past diagnoses of post-traumatic stress disorder, borderline personality disorder and his own observation that

plaintiff was "likely psychopathic." Jorgenson knew or should have known that plaintiff's mental health was not sufficiently sound to permit his transfer to Supermax. On April 25, 2000, the Green Bay program review committee approved the transfer of plaintiff to Supermax.

OPINION

A. Motion to Dismiss Standard of Review

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, (1984)); Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997). Moreover, in a Rule 12(b)(6) motion to dismiss, all plaintiff's well-pleaded facts are taken as true, all inferences are drawn in favor of plaintiff and all ambiguities are resolved in favor of plaintiff. Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992).

As a preliminary matter, I note that in their briefs regarding defendants' motion to dismiss, both parties cite plaintiff's affidavit, which was filed with this court after the complaint had been filed as part of plaintiff's motion for a preliminary injunction. Essentially, plaintiff's affidavit states that he is a non-violent person and includes copies of

his inmate complaints and correspondence with prison officials. Generally in a 12(b)(6) motion, the court examines only the allegations in the complaint to determine whether they are sufficient to state a cause of action. General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). If a district court considers matters outside the pleadings, Rule 12(b) requires that "the motion shall be treated as one for summary judgment" under Fed. R. Civ. P. 56. Under this converted motion, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Id. The consideration of outside matters without converting the motion may result in reversible error. See Carter v. Stanton, 405 U.S. 669, 671 (1972); see also Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 684 n.8 (7th Cir. 1994) (noting that reversal may be necessary if district court did not provide adversely affected party with notice and opportunity to respond); see also Malak v. Associated Physicians, Inc., 784 F.2d 277, 280-81 (7th Cir. 1986). "The courts, however, have crafted a narrow exception to this rule to permit a district court to take judicial notice of matters of public record without converting a motion for failure to state a claim into a motion for summary judgment." General Electric, 128 F.3d at 1080-81 (citations omitted); see also 5A Wright & Miller, Federal Practice and Procedure § 1357 (2d ed. 1990) (noting that exception applies to "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint"). "This exception has allowed courts to avoid unnecessary

proceedings when an undisputed fact in the public record establishes that plaintiff cannot satisfy the 12(b)(6) standard." General Electric, 128 F.3d at 1081.

Defendants argue that this court should take judicial notice of plaintiff's affidavit as a public record, rather than converting their motion to dismiss into a motion for summary judgment. In addition, as defendants point out, plaintiff freely cites to his affidavit in his brief in response to defendants' motion to dismiss, indicating that the affidavit is undisputed. Because plaintiff's affidavit is part of the record of this case, plaintiff cites it repeatedly and in order to avoid unnecessary proceedings, I will take judicial notice of plaintiff's affidavit for the purpose of deciding this motion to dismiss.

B. Exhausting Administrative Remedies

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999) (noting that "if a

prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures.").

Defendants argue that plaintiff failed to exhaust his administrative remedies pursuant to 42 U.S.C. § 1997e(a) on his specific claim that his novel, Strangers, was confiscated improperly because it contained "pornographic material" and on his general claim that mail was not reaching him properly. Plaintiff counters that he filed at least eight inmate complaints addressing defendants' interference with his mail, including defendants' refusal to return plaintiff's novel because it was pornographic.

1. Specific claim of confiscation of plaintiff's novel

The key dates relating to the confiscation of plaintiff's novel, Strangers, are as follows. On January 14, 2000, defendant Bertrand notified plaintiff in writing that certain materials, including plaintiff's novel, had been rejected by the mailroom because they constituted contraband in violation of Department of Correction rules. On January 15, 2000, plaintiff wrote defendant Bertrand, requesting that he reconsider this decision. On January 21, 2000, defendant Bertrand replied, stating that he had reconsidered and some items would be

returned but plaintiff's novel would not because it contained "pornographic material." On February 2, 2000, plaintiff filed a complaint, GBCI-2000-3682. The inmate complaint examiner's report indicates that plaintiff alleged two issues, "mail is being improperly monitored" and "specific mail rejection." (Defendants agree that "specific mail rejection" refers to the confiscation of plaintiff's novel, Strangers. Dfts.' Reply to Mot. to Dismiss, dkt. #65, at 2.) The examiner's report further states that mail monitoring "is the only issue that will be addressed" and that the "specific mail rejection [plaintiff] cites in this complaint was not raised in a timely manner, and will not be addressed." Defendants argue that plaintiff's inmate complaint related to mail monitoring only, not confiscation of plaintiff's novel. Therefore, defendants contend, because plaintiff did not file a complaint regarding confiscation of his novel, that issue was not exhausted administratively. In response, plaintiff argues that he was using the specific instance of the confiscation of his novel to illustrate a general pattern of mail monitoring and that he made eight complaints dealing with interference with his mail, including confiscation of his novel. Plaintiff also asserts that the complaint regarding the confiscation of his novel was filed timely.

The first question is whether plaintiff's February 2, 2000, complaint regarding the confiscation of his novel was timely. Defendants do not address timeliness of the confiscation complaint, but the complaint examiner's report states specifically that the confiscation issue was not addressed because it was untimely. Plaintiff asserts that this

complaint was timely but does not discuss his reasoning in any detail. In any event, according to Wis. Admin. Code DOC § 310.09(3), an inmate "shall file a complaint within 14 calendar days after the occurrence giving rise to the complaint." On March 15, 2000, plaintiff wrote a letter to the appeal examiner explaining that his confiscation complaint (GBCI-2000-3682) was timely because the 14-day period began to run on January 21, 2000, the date defendant Bertrand issued his final decision on the matter. Section 310.09(3) states that an inmate has 14 days "after the occurrence giving rise to the complaint" to file the complaint. The occurrence giving rise to the complaint was the confiscation of plaintiff's novel (January 14, 2000), not defendant Bertrand's denial of plaintiff's request for reconsideration of that confiscation (January 21, 2000). In other words, plaintiff had 14 days from January 14, 2000, the date of the confiscation, in which to file a complaint with respect to the confiscation of his novel in order to exhaust his administrative remedies properly under DOC § 310.09(3).

Plaintiff filed his complaint on February 2, 2000, more than 14 days after the occurrence giving rise to the complaint. Although plaintiff sought to resolve the matter through informal means, a request for reconsideration pursued with the warden does not stop the 14-day clock from running. Because plaintiff failed to file a complaint alleging that defendants confiscated his novel, Strangers, within 14 days of the confiscation, I will dismiss this claim for failure to exhaust administrative remedies.

2. General claim that mail was delayed or rejected

Defendants argue that plaintiff did not exhaust his administrative remedies on his general claim that defendants failed to deliver his mail. Plaintiff argues that he filed and appealed eight complaints relating to interference with his mail and provides two examples. First, in complaint GBCI-2000-6831, the examiner observes that plaintiff "complains about the rejection of a mail piece" and indicates a "rejected mail piece." Second, in complaint GBCI-2000-5381, the examiner notes that the nature of plaintiff's complaint is "rejected mail" and that he complains about "the denial of items set to him through the mail." Both complaints were appealed properly to defendant Secretary Litscher. Although defendants concede that plaintiff made specific complaints, they argue that specific complaints of mail rejection are not enough to administratively exhaust a general complaint of interference with plaintiff's mail. However, I do not find such a duplicative exhaustion requirement in the Wisconsin Administrative Code. Plaintiff filed and appealed several complaints alleging specific instances of interference with his mail pursuant to Department of Corrections regulations. Specifically, the code states that an "inmate shall only include one issue in each complaint" and that an "inmate shall file a complaint . . . after the occurrence giving rise to the complaint." Wis. Admin. Code DOC § 310.09. Department of Corrections regulations do not require plaintiff to re-file a cumulative complaint, reiterating past specific complaints

filed, in order to exhaust a general claim of mail interference based on these specific occurrences. Moreover, such a complaint would likely be dismissed as untimely or as including more than one issue. Because I find that plaintiff has exhausted his administrative remedies with respect to the specific complaints of mail rejection, defendants' motion to dismiss for failure to exhaust administrative remedies for the general claim of mail interference will be denied.

C. Qualified Immunity

Under the doctrine of qualified immunity, public officials may not be held personally liable for performing discretionary functions as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants argue that they have qualified immunity with respect to following three claims: (1) denying personal photocopying privileges; (2) denying multiple copies of incoming documents; and (3) confiscating contracts to engage in a business enterprise. Dfts.' Reply to Mot. to Dismiss, dkt. #65, at 4.

The court employs a two-pronged analysis to determine whether governmental officials are protected by qualified immunity. First, the court determines whether plaintiff's claims state a violation of his constitutional rights. If the first prong is satisfied, the court

then determines whether those rights were clearly established at the time the violation occurred. Wilson v. Layne, 526 U.S. 603 (1999). In an order entered May 30, 2001, I granted leave to proceed on plaintiff's general allegation that he was not allowed to send and receive certain literary and poetry mailings in violation of the First Amendment. Order dated May 30, 2001, dkt. #12, at 21. I did not discuss plaintiff's more specific claims that he was denied personal photocopies, multiple copies of incoming documents and contracts to engage in a business enterprise, which do not constitute a violation of his First Amendment rights.

It is well settled that an infringement on an inmate's First Amendment rights is permissible if it is "reasonably related to legitimate penological interests." O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (quoting Turner v. Safley, 482 U.S. 78, 81 (1987)). Nevertheless, plaintiff contends that defendants' assertion of qualified immunity is premature because defendants have not submitted any evidence to establish that their actions were related to legitimate penological interests. However, plaintiff bears the burden of establishing a violation of a constitutional right and of showing that the law was clearly established with respect to each of these issues. Once a public official raises the affirmative defense of qualified immunity it is plaintiff's burden to defeat that assertion. Spiegal v. Cortese, 196 F.3d 717, 723 (7th Cir. 1999); Perry v. Sheahan, 222 F.3d 309, 315 (7th Cir. 2000) (plaintiff bears burden of demonstrating that defendants violated constitutional right

that was clearly established at time of occurrence). Plaintiff cites Auriemma v. Rice, 910 F.2d 1449, 1453-55 (7th Cir. 1990) (en banc), and Rakovich v. Wade, 850 F.2d 1180, 1204-05 (7th Cir. 1988), for the proposition that defendants bear the burden of proving that their actions were clearly established at the time in question. However, neither of these cases supports this proposition. In fact, in Rakovich, the court stated explicitly that it "is the plaintiff who bears the burden of establishing the existence of the allegedly clearly established constitutional right." Rakovich, 850 F.2d at 1209. Presumably, as a result of plaintiff's mistaken belief that defendants bear the burden, plaintiff did not cite any legal authority demonstrating that defendants violated a clearly established constitutional or statutory right that a reasonable person would have known about. Harlow, 457 U.S. at 818. Nevertheless, research reveals no such rights were clearly established as required under Harlow. In fact, the case law establishes just the opposite: prison officials have a legitimate penological interest in denying prisoners personal photocopies, multiple copies of incoming documents and contracts to engage in a business enterprise.

1. Personal photocopies

Plaintiff alleges that defendants refused to make photocopies of his personal written work, preventing him from sending his work to prospective publishers in violation of the First Amendment. Defendants acknowledge that legal photocopies cannot be denied, but

personal photocopies are not allowed because it would place an undue burden on staff. The Court of Appeals for the Seventh Circuit has stated that "broad as the constitutional concept of liberty is, it does not include the right to xerox." Jones v. Franzen, 697 F.2d 801, 803 (7th Cir. 1983). To make out a § 1983 claim based on the denial of copying privileges, plaintiff has to show that the denial prevented him from exercising his constitutional right of access to the courts. Id. The reasonableness of a prison's photocopy policy becomes relevant only after the prisoner has shown that the policy is impeding access to the courts, "for if it is unreasonable but not impeding he has not made out a prima facie case of violation of his constitutional rights." Id. Because plaintiff cannot show that he has a constitutional right to photocopies of non-legal materials, he cannot establish the first prong of this claim.

2. Multiple copies of incoming documents

Plaintiff alleges that defendants would not allow him to receive multiple copies of incoming documents in violation of the First Amendment. Defendants argue that Department of Corrections policy does not allow inmates to receive multiple copies of any documents. Defendants' refusal to allow plaintiff to receive multiple copies of incoming documents does not deprive him of any opportunity to express himself or communicate with the outside world. I conclude that plaintiff has failed to show that defendants' denial of

multiple copies violate any constitutional right.

3. Contracts to engage in a business enterprise

Plaintiff alleges that defendants withheld certain contracts he had received in the mail in violation of the First Amendment. Defendants argue that they withheld plaintiff's contracts because, although an inmate may write and seek publication, he may not enter into a binding contract to engage in a business enterprise. Defendants assert that the contracts allowed plaintiff to engage in business through a second party (his agent) in violation of Department of Corrections regulations. Plaintiff does not deny that the contracts at issue were for the purpose of engaging in business. Plaintiff cites no case or constitutional provision that protects his ability to engage in business while incarcerated and I am aware of none. I conclude, therefore, that plaintiff has no constitutional claim concerning his alleged right to receive contracts.

Because I find that plaintiff's specific claims do not rise to the level of First Amendment violations, I will grant defendants' motion to dismiss as to the claims of denying plaintiff personal photocopies, refusing multiple incoming documents and rejecting contracts to engage in a business enterprise.

D. Retaliation

Plaintiff alleges that defendants transferred him to Supermax in retaliation for a conduct report he received while at the Oshkosh Correctional Institution, a letter to a journalist and state senator critical of the out-of-state placement of Wisconsin prisoners, publishing letters and opinion pieces critical of the Department of Corrections, attempts to mail literary work to publishers and the filing of complaints and appeals against defendants in the inmate complaint review system and in court. Defendants contend that plaintiff's retaliation claim is barred by doctrines enunciated in Heck v. Humphrey, 512 U.S. 477 (1994), and Zinermon v. Burch, 494 U.S. 113 (1990). Zinermon pertains to procedural due process only. As plaintiff acknowledges, he has not alleged any procedural due process violations.

Heck stands for the proposition that in order to recover damages under § 1983 for allegedly unconstitutional conviction or imprisonment, a plaintiff must prove that a conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal or called into question by a federal court's issuance of a writ of habeas corpus. Heck, 512 U.S. at 486-87. A damages claim that "necessarily demonstrates the invalidity of the conviction" is prohibited. Id. at 481-82. A conviction may be contested on appeal or by collateral attack, but not by a civil action. Gonzalez v. Entress, 133 F.3d 551 (7th Cir. 1998). Moreover, the Heck doctrine extends to a

disciplinary hearing and its resulting sanctions. Edwards v. Balisok, 520 U.S. 641 (1997). The Court of Appeals for the Seventh Circuit has held that Heck does not apply where a plaintiff challenges only a condition of confinement and does not challenge the fact or duration of his confinement. DeWalt v. Carter, 224 F.3d 607, 617 (7th Cir. 2000); see also Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991) (stating that if a prisoner is challenging "merely the conditions of confinement his proper remedy is under the civil rights law").

Defendants argue that under Heck, plaintiff cannot bring a § 1983 action for damages because he has failed to reverse the three conduct reports that led to his transfer to Supermax. The reports that led to plaintiff's transfer, according to the program review inmate classification summary included in plaintiff's affidavit, include (1) a Fox Lake Correctional Institution report for participating in group resistance and threatening another inmate; (2) an Oshkosh Correctional Institution report for lying about staff; and (3) a Green Bay Correctional Institution report for threatening to harm the warden. Although plaintiff argues that he lost good time credit as a result of the Oshkosh conduct report, he nevertheless asserts that Heck is inapplicable because the disciplinary actions did not affect the fact or duration of his confinement. In any event, plaintiff addresses only the Oshkosh lying-about-staff conduct report (this is the only report that plaintiff alleges was a basis for his retaliatory transfer) and argues that Heck does not apply to it because his challenge does

not necessarily imply the invalidity of that report. To illustrate his point, plaintiff asserts that it is reasonable to infer that defendants were motivated to transfer him to Supermax because he had tried to send a letter criticizing the Department of Corrections rather than because of the disciplinary implications reflected by the report. Plaintiff's reasoning does not negate the fact that a finding in his favor on his § 1983 damages claim would necessarily render the Oshkosh conduct report invalid and therefore violate the Heck doctrine.

But plaintiff argues that he has alleged more than just the Oshkosh conduct report as a basis for defendants' retaliatory action of transferring him to Supermax. Specifically, plaintiff alleges that defendants transferred him to Supermax because of his letters to newspapers and legislators that were critical of Department of Correction policies and the fact that he has filed legal actions as well as numerous internal prison complaints.

It is true that prisoners do not have a liberty interest in not being transferred from one institution to another. Meachum v. Fano, 427 U. S. 215 (1976) (due process clause does not limit interprison transfer even when new institution is much more disagreeable). But a prison official who takes action against a prisoner in retaliation for the prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 274 (7th Cir. 1996). The facts alleged must be sufficient to show that absent a retaliatory motive, the prison official would have acted differently. Id. at 275. Plaintiff's affidavit establishes that defendants may have had a non-retaliatory motive for

transferring him to Supermax, namely, the Fox Lake, Oshkosh and Green Bay conduct reports. (Although the Heck doctrine prohibits plaintiff from basing a § 1983 damages claim on the Oshkosh report, the report nevertheless remains a permissible rationale for his transfer as well as a viable argument for injunctive relief. Heck, 512 U.S. at 481.) But these three conduct reports, in and of themselves, do not necessarily establish that absent plaintiff's letters to newspapers and legislators criticizing Department of Correction policies and numerous legal actions and inmate complaints he has filed, defendants would have transferred him to Supermax. In other words, the essential question is whether defendants transferred plaintiff to Supermax because of three conduct reports (which would be permissible) or because of his vocal criticisms of the Department of Corrections and his incessant complaint filing (which would be impermissible). Such a question is best answered by the jury or fact-finder.

Although the Heck doctrine will bar plaintiff's First Amendment claims related to the Oshkosh conduct report as to § 1983 damages only, defendants' motion to dismiss plaintiff's retaliation claim will be denied.

ORDER

IT IS ORDERED that

1. The motion to dismiss of Defendants Jon E. Litscher, Daniel Bertrand, Barbara

Studenmaier, Novitski, Thomas Donovan and Delavaux is GRANTED against plaintiff Daniel Harr's claim that his novel, Strangers, was confiscated improperly for failure to exhaust administrative remedies;

2. Defendants' motion to dismiss plaintiff's claim of general mail interference for failure to exhaust administrative remedies is DENIED;

3. Defendants' motion to dismiss plaintiff's claims that he was denied personal photocopies, multiple copies of incoming documents and contracts to engage in a business enterprise is GRANTED because these claims do not rise to the level of First Amendment violations;

4. Defendants' motion to dismiss plaintiff's First Amendment claims related to the Oshkosh conduct report is GRANTED as to § 1983 damages only; and

5. Defendants' motion to dismiss plaintiff's retaliation claim is DENIED.

Entered this 19th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge