IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DANIEL HARR,

Plaintiff,

OPINION AND ORDER

01-C-0159-C

v.

STATE OF WISCONSIN DEPARTMENT
OF CORRECTIONS, JON E. LITSCHER,
individually and in his official capacity as
Secretary of the State of Wisconsin Department
of Corrections; GERALD A. BERGE, individually
and in his official capacity as Warden, Supermax
Correctional Institution; RICHARD VERHAGEN,
individually and in his official capacity as
administrator of the State of Wisconsin Department
of Corrections Division of Adult Institutions;
DANIEL BERTRAND, individually and in his official capacity
as Warden of the Green Bay Correctional Institution;
JEFFEREY JAEGER, in his individual capacity;
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; DELVAUX, in his/her individual capacity;
MARK ZIMONICK, in his individual capacity;
and TERRY JORGENSON, in his individual capacity,

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, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, alleges that defendants violated his First Amendment rights by interfering with his ability to send and receive literary works, retaliated against him by transferring him to Supermax and subjected him to unconstitutional conditions of confinement.

Plaintiff has paid the full fee for filing his complaint. However, because he is a prisoner and defendants are "governmental entit[ies] or officer[s] or 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 petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner 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 has moved for a preliminary injunction pursuant to Fed. R. Civ. P. 65(e) and a mental examination pursuant to Fed. R. Civ. P. 35. Defendants have moved for a stay of the proceedings because plaintiff is a member of a pending class action in the case Jones'El

v. Berge, Case No. 00-C-421-C, in which the plaintiffs allege that the conditions of confinement at Supermax violate the Eighth Amendment. Plaintiff will be allowed to proceed on his First Amendment claim against defendant Bertrand and his retaliation claim against defendants Staudenmaier, Novitski, Donovan and Delvaux. Plaintiff's Eighth Amendment claim will be dismissed because of his membership in the pending class action in Jones'El. Plaintiff's motions for a preliminary injunction and for a mental examination and defendants' motion for a stay will be denied as moot because they relate to plaintiff's Eighth Amendment claim that will be dismissed.

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

ALLEGATIONS OF FACT

A. Parties

Plaintiff Daniel Harr is an inmate at the Supermax Correctional Institution. Defendant State of Wisconsin Department of Corrections is a department of the executive branch of the state of Wisconsin. Defendant Jon E. Litscher is the secretary of the Wisconsin Department of Corrections. Defendant Richard Verhagen is the administrator of the Wisconsin Department of Corrections Division of Adult Institutions. Defendant Gerald Berge is the warden of the Supermax Correctional Institution.

The following defendants are employed at the Green Bay Correctional Institution.

Defendant Daniel Bertrand is the warden; defendant Jefferey Jaeger is the security director; defendant Barbara Staudenmaier is the program review coordinator; defendants Thomas Donovan, Novitski and Delvaux are members of the program review committee; defendant Mark Zimonick is a social worker; and defendant Terry Jorgenson is a staff psychologist.

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, the letter stated that it had been reported to plaintiff that Wisconsin prisoners

placed out-of-state were not receiving needed treatment and other rehabilitation programs, adequate diet, medical care and recreational opportunities; that the institutions did not allow Wisconsin prisoners to keep radios, television and other personal property items; that verbal and physical abuse by staff was widespread; that staff used tear gas and pepper spray wantonly on Wisconsin inmates; that staff lost or stole inmate mail frequently; that staff sold drugs and liquor to some inmates; and that other abuses were occurring. In the letter, plaintiff asked for an investigation of the allegations. The letter 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's letter 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 an adult 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 adult 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 the 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 minimum 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 defendant 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 his request 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 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.

In 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. See Harr v. McCaughtry, Case No. 99-3215.

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 titled Strangers and literary publications that were withheld because they contained 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 wrote to plaintiff to tell him that some of the items withheld would be returned to plaintiff but that plaintiff 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 8, 2000, plaintiff wrote to defendant Bertrand to ask why he 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 television news producers in Wisconsin 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 officials owned stock in the privately held Corrections Corporation of America, asked 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 1, 2000, plaintiff filed an inmate complaint,

GBCI-2000-3682, challenging the institution's refusal to deliver the two items of mail. 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's letter 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 mail room 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 returned by publishers were not returned to him by 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 mail room 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."

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 plaintiff's mail. Plaintiff filed these 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). These complaints 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, defendant Zimonick submitted a report on plaintiff for use by the program review committee in reviewing plaintiff's custody level and placement. Defendant Zimonick recommended that plaintiff be transferred to Supermax. Defendant 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. Defendant 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 Institution.

On April 25, 2000, the program review committee at Green Bay Correctional Institution, consisting of defendants Staudenmaier, Novitski, Delvaux and Donovan, assigned plaintiff for incarceration at Supermax. In reaching its decision, the committee considered the conduct report for "lying about staff" for which plaintiff was found guilty at Oshkosh. Defendant Jaeger had referred plaintiff to the program review committee for consideration for placement at Supermax. Defendant Jaeger's recommendation was a determining factor in the committee's decision to assign plaintiff to Supermax. Defendant 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. Defendant 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.

Supermax uses a regime of isolation, sensory deprivation and behavior modification that is distinct from and more severe than other maximum security and segregation facilities

in the Wisconsin correctional system. Inmates are housed individually in small cells in which a fluorescent light is kept on twenty-four hours a day and a video camera is used for monitoring inmates. Inmates are allowed out of their cells for four one-hour periods of recreation each week. The recreation cell is not furnished, heated or air-conditioned. When outside their cell, inmates' feet are shackled and they are escorted by at least two guards. Most inmates are not allowed direct personal contact with anyone other than prison guards and prison staff. Meals are delivered to the inmates through slots in their cell doors. Religious services are available to inmates through closed circuit televisions that are in each cell. Inmates' only contact with visitors (other than their lawyers) is by a closed circuit television. Telephone contact with family is limited to two twelve-minute calls each month.

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. Defendant Jorgenson 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 observation that plaintiff was "likely psychopathic." Defendant Jorgenson knew or should have known that plaintiff's mental health was not sufficiently sound to permit his transfer to Supermax.

While at Supermax, plaintiff continued to write letters to news reporters and

legislators that were critical of department actions and officials and continued to file lawsuits and internal complaints. On October 3, 2000, plaintiff began to refuse all food and nutrition. On October 19, 2000, plaintiff signed a sworn statement in which he asserted that he did not consent to any medical treatment to prolong or save his life unless he was transferred permanently out of Supermax and that it was his intent to die if he was not transferred. This statement was delivered to department officials.

On October 31, 2000, Rodney Miller, Ph.D., Director of Psychology at Mendota Mental Health Institute, interviewed plaintiff. In a report dated November 2, 2000, Miller diagnosed plaintiff as "meet[ing] the diagnostic criteria for a Mixed Personality Disorder with narcissistic, borderline and antisocial features. . . . The personality disorder diagnosis is quite relevant to the current situation and the driving factor in current events. . . . It is the opinion of this evaluator, to a reasonable degree of certainty, that [plaintiff] will likely continue his hunger strike until the situation reaches a physical/medical crisis."

Plaintiff refused all food and nutrition until November 3, 2000, when defendants Berge, Verhagen and others decided to transfer him to a hospital. On November 3, the department filed a petition with the Dane County Circuit Court in which it alleged that plaintiff would suffer serious bodily harm or death if he was allowed to continue to refuse food and nutrition. Following an emergency hearing at the hospital, the court ordered that the department could administer nutrition and hydration to plaintiff forcibly if he would not

take it any other way. While at the hospital, plaintiff resumed eating and taking fluids. He stated that he would continue to do so unless and until he was returned to Supermax.

On November 9, 2000, the department transferred plaintiff to the infirmary at Dodge Correctional Institution. Plaintiff continued to eat and take fluids voluntarily. Immediately before plaintiff's transfer to Dodge Correctional Institution and during the time he was at the infirmary, plaintiff and persons acting on his behalf asked the department to reassess the appropriateness of plaintiff's placement at Supermax; no reassessment was performed.

On November 29, 2000, defendant department transferred plaintiff back to Supermax and plaintiff resumed his hunger strike. Plaintiff continued his hunger strike until December 30, 2000, at which point he discontinued the strike temporarily at the request of his lawyer in order to allow a legal proceeding to be initiated. Plaintiff has vowed to resume his hunger strike if the legal process does not result in his transfer out of Supermax.

OPINION

I. SCREENING

A. Defendant Wisconsin Department of Corrections and Official Capacity Claims

Plaintiff has named the Wisconsin Department of Corrections as a defendant in this case. The Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Michigan Department of State Police,

491 U.S. 58, 71 (1989). Furthermore, "[i]t is well-settled that a claim against a state or local agency or its officials may not be premised upon a *respondeat superior* theory." Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986) (citing Monell v. Department of Social Services, 436 U.S. 658, 694 (1978)). "The agency must be culpable in its own right, for example by having a policy of violating such rights." Bailey v. Faulkner, 765 F.2d 102, 104 (7th Cir. 1985). Plaintiff may not proceed against defendant Wisconsin Department of Corrections or any of the defendants in their official capacities.

B. First Amendment

Plaintiff contends that defendant Bertrand violated his First Amendment rights by interfering with his ability to mail literary works to publishers, to receive mail from publishers and to receive poetry and other literary newsletters and magazines. Prisoners have protected First Amendment rights to send and receive mail. See Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999). Prison actions that affect an inmate's ability to send or receive non-legal mail must be "reasonably related to legitimate penological interests." Thornburgh v. Abbott, 490 U.S. 401, 409 (1989); see also Turner v. Safley, 482 U.S. 78, 89-90 (1987) (setting forth four factor test); Bell v. Wolfish, 441 U.S. 520 (1979). 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).

Although defendant Bertrand may be able to present a legitimate reason for not allowing plaintiff to send or receive certain literary and poetry mailings, it is too early in this case to make that determination. Defendant Bertrand told plaintiff that he could not receive certain items in the mail because they contained pornographic material, constituted "gambling" or violated the rule against duplicate copies. It may be that defendant applied these prohibitions on certain materials in a way that did not violate the First Amendment. However, at this stage in the proceedings, plaintiff's allegations are sufficient to support a First Amendment claim that defendant Bertrand interfered with his ability to send and receive certain materials.

C. Retaliation

Plaintiff alleges that defendants Staudenmaier, Novitski, Delvaux, Bertrand, Litscher, Verhagen and Berge transferred him to Supermax in retaliation for his letter to a journalist and state senator critical of the out-of-state placement of Wisconsin prisoners, his publishing

letters and opinion pieces critical of the Department of Corrections' policies, his attempts to mail literary work to publishers and his filing of complaints and appeals against defendants in the inmate complaint review system and in court. A prison official who takes action against a prisoner to retaliate for the prisoner's exercise of a constitutional right may be liable to the prisoner for damages. See 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. See id. at 275.

Plaintiff cannot support his retaliation with allegations that defendants retaliated against him for his literary writings that are unrelated to his letter in which he is critical of the Department of Corrections without suggesting some reason to suspect or explain why defendants would retaliate against plaintiff for such writings. He has made no such suggestion. In addition, plaintiff cannot support his retaliation claim with allegations that he was retaliated against for writing to the Wisconsin State Journal and Senator Risser because he has raised these allegations in another lawsuit. However, it does not appear that plaintiff has raised his claim that while he was at the Green Bay Correctional facility, he filed seven inmate complaints, one lawsuit, one appeal and wrote at least one letter to the media in which he was critical of the Wisconsin Department of Corrections, for which he was retaliated against by his transfer to Supermax. It may be that plaintiff was transferred to Supermax for a non-retaliatory reason; however, at this stage of the proceedings, plaintiff has

alleged sufficient facts to bring a viable retaliation claim against the members of the program review committee who made the decision to transfer plaintiff to Supermax. Accordingly, plaintiff may proceed against defendants Staudenmaier, Novitski, Donovan and Delvaux on his claim that he was retaliated against for filing inmate complaints and lawsuits (other than this one) and for writing a letter to the media in which he was critical of the department. Plaintiff may not proceed against any of the other defendants on his retaliation claim because they were not personally involved in the decision to transfer him to Supermax. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (holding that liability under § 1983 must be based on the defendant's personal involvement in the constitutional violation).

D. Conditions of Confinement

Plaintiff also contends that the conditions of confinement at Supermax violate his Eighth Amendment rights. On February 16, 2001, I certified a class in the case of Jones'El v. Berge, Case No. 00-C-421-C, that consists of "all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin." In the class action, plaintiffs are suing the warden of Supermax, Gerald Berge, for violating their constitutional rights by subjecting them to conditions of confinement that violate their Eighth Amendment rights. Because plaintiff is an inmate at Supermax, he is a member of the class in Jones'El v. Berge; therefore, he may not bring a separate action for injunctive or

declaratory relief in which he alleges that the conditions at Supermax violate his Eighth Amendment rights. Because plaintiff does not request monetary damages for the alleged Eighth Amendment violations at Supermax, this claim will be dismissed as barred by the class action in Jones'El v. Berge. If plaintiff wishes to seek damages for the alleged violations of his Eighth Amendment rights as a result of the conditions at Supermax, he may do so in a lawsuit that is separate from the present case and Jones'El v. Berge.

II. PLAINTIFF'S MOTIONS

Plaintiff has moved for a preliminary injunction requiring defendants to transfer him out of Supermax "to any other appropriate prison or other place of confinement in the State of Wisconsin where he will not be subjected to the extreme isolation, sensory deprivation and the other mentally debilitating treatment he is subjected to at the Supermax, . . . and where he will be able to receive appropriate mental health treatment pending the final determination of the claims." Plt.'s M. Preliminary Inj., dkt. #4, at 1. In support of his motion, plaintiff contends that has a substantial likelihood of prevailing on the merits, he has no satisfactory remedy at law and he is suffering irreparable harm in the way of intolerable mental and physical pain and anguish and the likelihood that he will cause death or serious physical harm to himself.

Plaintiff's motion for a preliminary injunction is tied directly to his claim that the

conditions of confinement at Supermax are a violation of his Eighth Amendment rights. Because this claim will be dismissed because plaintiff is a member of the class in Jones'El v. Berge, Case No. 00-C-421-C, plaintiff's motion for a preliminary injunction will be denied. Plaintiff's request for an order requiring defendants to produce him for a mental examination pursuant to Fed. R. Civ. P. 35 was submitted in support of plaintiff's motion for a preliminary injunction. It will be denied as moot.

III. DEFENDANTS' MOTION FOR A STAY

Defendants request a stay of ths proceeding because of the overlap between this case and the class action in Jones'El v. Berge. Because plaintiff's Eighth Amendment conditions of confinement claim will be dismissed, defendants' motion for a stay will be denied because plaintiff's remaining two claims are unrelated to Jones'El v. Berge.

ORDER

IT IS ORDERED that

1. Plaintiff's Eighth Amendment claim is DISMISSED because of his membership in the class in the case Jones'El v. Berge in which plaintiffs are seeking injunctive and declaratory relief for Eighth Amendment violations at Supermax.

2. Plaintiff Daniel Harr may proceed on his claim that defendant Bertrand violated his First Amendment rights by interfering with his ability to send and receive literary works from the prison and on his retaliation claim against defendants Staudenmaier, Novitski, Donovan and Delvaux. All other defendants are dismissed from this case.

3. Plaintiff's motion for a preliminary injunction is DENIED as moot.

4. Plaintiff's motion for an order for mental examination is DENIED as moot.

5. Defendants' motion for a stay of the proceedings is DENIED as moot.

Entered this 30th day of May, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge