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, in his individual capacity;
DANIEL BERTRAND, in his individual capacity;
BARBARA STAUDENMAIER, in her individual capacity;
ROBERT NOVITSKI, in his individual capacity;
THOMAS DONOVAN, in his individual capacity;
and MICHAEL DELVAUX, in his individual capacity,

Defendants.

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This is a civil action for injunctive and declaratory relief and money damages brought by Daniel Harr, an inmate of the Supermax Correctional Institution in Boscobel, Wisconsin. Plaintiff contends that defendants Jon R. Litscher, Daniel Bertrand, Barbara Staudenmaier, Robert Novitski, Thomas Donovan and Michael Delvaux 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 from the Green Bay Correctional Institution. It is before the court on plaintiff's motion for a preliminary injunction ordering his return

to Green Bay and on defendants' motion to strike the affidavit of Dr. Gerald Wellens.

The motion to strike will be denied. Defendants believe that it was improper for plaintiff's counsel to talk directly to Wellens without the permission of defendants' counsel because Wellens is an employee of the Department of Corrections. If the department were a party to the suit, defendants' motion would have merit. Because the department is not a party, there is no reason to apply any sanctions to plaintiff, including the striking of Wellens's affidavit.

Taking into consideration the slight chance that plaintiff could prevail on the merits ultimately, I find that the balance of the hardships and the public interest weigh in favor of defendants. For that reason, I will deny the motion for a preliminary injunction. However, because plaintiff has shown slightly more than a negligible chance of success of the merits and there are so many disputed facts, I believe it would be useful to try the case on its merits as soon as possible. Accordingly, I will set a scheduling hearing for January 9, 2002, at 4:00 p.m. in Courtroom 250 to discuss the possibility of scheduling an earlier trial date than the one set previously.

For the sole purpose of deciding this motion for a preliminary injunction, I find from the parties' proposed findings of fact and the record the following undisputed facts.

## UNDISPUTED FACTS

A. The Parties

Plaintiff Daniel Harr is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin. He has been incarcerated since August 12, 1997. From April 6, 1999 to September 17, 1999, he was housed at the Oshkosh Correctional Institution; from September 17, 1999 until April 25, 2000, when he was transferred to Supermax, he was housed at the Green Bay Correctional Institution. Plaintiff is a poet and author and has had pieces published in the Wisconsin State Journal and The Milwaukee Journal-Sentinel since he has been incarcerated. In addition, he has written articles and letters to the editor critical of Department of Corrections policies.

Defendant Jon E. Litscher is Secretary of the Wisconsin Department of Corrections. Defendant Daniel Bertrand serves as Warden of the Green Bay Correctional Institution and defendant Barbara Staudenmaier serves as the program review committee coordinator. The remaining defendants serve as members of the program review committee: defendant Thomas Donovan as education representative; Robert Novitski as social service representative; and Michael Delvaux as security representative.

B. Chronology of Events

May 13, 1999. Plaintiff drafts a letter to the Wisconsin State Journal, describing alleged abuse and mistreatment of Wisconsin prisoners in out-of-state prisons. Plaintiff

takes the letter to library for copying; the prison librarian confiscates it and turns it over to security.

May 30, 1999. Security issues plaintiff a conduct report for "lying about staff."

June 9, 1999. Disciplinary committee finds plaintiff guilty of making statements that "could harm staff morale, staff reputation and Department integrity." Plaintiff is found guilty of major violation and receives a period of segregation as a sanction.

July 2, 1999. Plaintiff files an inmate complaint, alleging errors in the adjustment committee process.

July 7, 1999. Plaintiff appears before the program review committee for the annual review of his placement.

July 22, 1999. The program review committee recommends that plaintiff's security rating be increased from "medium" to "maximum" because of his conviction of a major rule violation for writing the May 13 letter.

September 17, 1999. Plaintiff is transferred to the Green Bay Correctional Institution, a maximum security facility.

October 26, 1999. Plaintiff files an inmate complaint, alleging that the Green Bay prison library is refusing to make photocopies of his creative writing so that he may submit his writing to prospective publishers.

October 29, 1999. Defendant Bertrand accepts an inmate complaint examiner's

recommendation to dismiss plaintiff's complaint.

October 29, 1999. Plaintiff files a lawsuit in the United States District Court for the Eastern District of Wisconsin, challenging the discipline imposed on him at the Oshkosh facility for writing the May 13 letter.

January 14, 2000. Defendant Bertrand writes plaintiff, saying he has reviewed materials rejected by the mailroom and is satisfied that they were rejected properly as violative of the state's administrative code, which prohibits prisoners from entering into binding contracts and arranging to engage in business through a second party outside the prison.

January 15, 2000. Plaintiff complains to defendant Bertrand that some of his mail is not being delivered and some is not delivered in a timely fashion.

January 21, 2000. Defendant Bertrand responds with an explanation for the rejection of certain mail items, telling plaintiff that he will not be allowed to receive the following items: 1) a contract because, as written, the contract does not comply with Wisconsin laws for offenders; 2) a story entitled "Strangers," because it contains pornographic material; 3) multiple copies of a form letter (plaintiff may have one only); and 4) multiple copies of an article. Bertrand tells plaintiff he may not use a pseudonym unless he informs the agent or publisher of the circumstances and tells them that the name is a pseudonym and that mail sent to plaintiff will not be delivered to him unless it bears his legal name.

January 24, 27 and 28, 2000. Plaintiff tries to persuade defendant Bertrand that writing contests with prizes awarded on the basis of the quality of the work do not constitute "gambling" or "gaming" within the meaning of Department of Corrections regulations.

January 26, 2000.

– Plaintiff's classification is reviewed by the Green Bay program review committee made up of defendants Staudenmaier, Novitski and Donovan. The committee considers a letter from Dr. Gerald Wellens, director of Green Bay psychological services, who has been treating plaintiff for post-traumatic stress disorder, in which Wellens recommends that plaintiff be admitted to the veterans' post-traumatic stress disorder program at Fox Lake Correctional Insitution. In addition, the committee considers a summary from plaintiff's social worker in which the social worker assesses plaintiff as medium risk for sentence structure, institution adjustment and emotional mental health. He adds that plaintiff has no detainers lodged against him and no history of escape attempts. The committee recommends that plaintiff remain at Green Bay until an out-of-state transfer can be arranged, noting that plaintiff has had two previous failures in medium security institutions and refuses to work except at tasks of his own choosing.

– Plaintiff writes to Stephen Puckett, Director of Offender Classification and Movement, alleging retaliation by the program review committee.

– Plaintiff writes to defendant Staudenmaier, saying it was "retaliatory and

punative [sic]" for the committee to base its classification decision on plaintiff's refusal to take a kitchen job and "ridiculous" to say he needs additional counseling with Wellens when Wellens has recommended a transfer to Fox Lake Correctional Institution.

January 27, 2000. Plaintiff sends letters to various Wisconsin news producers criticizing the state's program of transferring prisoners out of state and suggesting investigation into such things as the governor's and legislators' ownership of stock in Corrections Corporation of America.

January 28, 2000. Plaintiff is informed that two items of mail will not be delivered because they contain entry forms for writing competitions with cash prizes.

February 2, 2000. Plaintiff files an inmate complaint, alleging that his mail is being monitored. Defendant Bertrand adopts a hearing examiner's recommendation to dismiss complaint.

February 4, 2000. Puckett makes a final decision on plaintiff's placement, noting that "Maximum custody is appropriate. Out of state placement is supported, given population pressures."

February 14, 2000. Defendant Bertrand issues a new mailroom policy, setting out the number of copies of publications an inmate may keep in his cell.

February 15, 2000. Plaintiff writes to Bertrand telling him he has written to several newspaper reporters who are investigating the system's failure to promote rehabilitation.

Plaintiff writes that defendant Bertrand will have to "address those issues 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."

February 16, 2000. Plaintiff writes to defendant Litscher complaining about defendant Bertrand's refusal to allow plaintiff to enter competitions with cash prizes and his application of other rules to plaintiff's written works. Plaintiff states that he is sending copies of the letter to the media, state legislators and his attorney.

February 17, 2000. Plaintiff files an inmate complaint, alleging that he has not received six parcels sent to him by his family containing short stories and documents plaintiff had written and saying that he believes the parcels should not have been kept from him because they were mailed before defendant Bertrand posted his new mailroom policy.

February 19, 2000. Plaintiff writes Bertrand, stating, "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. . . . 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."

February 21, 2000. Plaintiff files two inmate complaints, complaining about the denial of mailed items and telling defendant Bertrand that he had no authority to put limits on the number of written works an inmate might mail out of the institution in an effort to

seek publication. (Shortly afterward, defendant Bertrand accepts the complaint examiner's recommendation to dismiss both complaints.)

March 2, 2000. Plaintiff writes to various Wisconsin newspapers saying that the Department of Corrections is using out-of-state transfers as punishment and as a means of ridding the state of inmates who speak out about abuses.

March 4, 2000.

– Defendant Bertrand writes plaintiff, telling him that his publication efforts will remain subject to the rules. He adds that "learning to comply with rules is also part of being rehabilitated."

– Plaintiff writes Wellens a letter in which he says, "[E]ither get me the hell out of this prison now or I might want to find a way to hurt the warden or one of his little devils very soon. I can't take any more of this crap." He adds, "The warden is making me a very dangerous man because I'm VERY close to finding a way to hurt him. I'm doing everything I can to remain calm, but that piece of shit pushes me just a little bit further with this kind of crap every few days."

March 5, 2000. Plaintiff asks Wellens to put a hold on plaintiff's eligibility for an out-of-state transfer for mental health reasons.

March 6, 2000. Plaintiff files an inmate complaint, contesting the rejection of a piece of mail containing information about contests with cash prizes. (Shortly afterward,

defendant Bertrand accepts the complaint examiner's recommendation to dismiss the complaint.)

March 7, 2000. Wellens forwards plaintiff's March 4 letter to defendant Bertrand, who refers it to Jeffrey Jaeger, Green Bay security director, for issuance of a conduct report. Captain Brant writes plaintiff a conduct report charging him with threats and disrespect. Defendant Bertrand views the letter as physically threatening to his staff and to him, rather than as a mere threat of legal action of the sort plaintiff had written in the past.

March 15, 2000. Plaintiff files an inmate complaint, alleging the non-delivery of a piece of mail.

March 20, 2000. Defendant Bertrand dismisses plaintiff's complaint.

March 23, 2000.

– A disciplinary hearing is held on plaintiff's March 7 conduct report. Plaintiff asks that Wellens, defendant Bertrand and Capt. Brant be called as witnesses but his request is refused as to Wellens and Bertrand. Brant fails to appear. The disciplinary committee has before it a letter from Wellens explaining that he turned plaintiff's letter over to the warden because he is required to do so when there is threatening language but that he did not believe there was any

> indication in this letter that there was any actual threat of physical violence to anyone. . . . It was clear to me that what [plaintiff] meant was that he would engage in his verbal litigious conduct in his never ending attempts to oppose DOC and DOC

> policies and policy implementations. There is no question but that [plaintiff's] written language is hateful and threatening but it has always been clear to me that the way he implements his threats is through litigiousness ways.

– The disciplinary committee finds plaintiff guilty of both charges.

April 4, 2000. Acting on an appeal filed by plaintiff, defendant Bertrand remands the matter to the disciplinary committee to allow plaintiff to call Capt. Brant as a witness.

April 17, 2000. A disciplinary committee holds a new hearing and finds plaintiff not guilty of the charge of disrespect and guilty of the charge of threats.

April 19, 2000. Plaintiff appeals the finding.

April 24, 2000.

– Security Director Jaeger asks Mark Zimonick, a Green Bay institutional social worker, to complete a portion of the program review committee worksheet for plaintiff because a program review committee hearing is to be held the next day for plaintiff, with the possibility that he will be transported to Supermax immediately afterwards. Without talking to defendant Bertrand about plaintiff, Zimonick recommends that plaintiff be transferred to Supermax. Zimonick notes that plaintiff has been serving time in segregation after having been found guilty of threatening harm to the warden in a letter, that he had received a major conduct report in June 1999, for lying about staff and that he had received conduct reports during the summer of 1998 for group resistance and petitions and threats of harm to another inmate. Zimonick notes that plaintiff's safety is at risk in the general population

because he had been employed as a correctional officer at a federal prison and that plaintiff is serving a ten-year sentence for solicitation to commit first degree murder and has convictions for possession of a firearm by a felon.

– Because Department of Corrections policy requires that inmates be screened for mental illness before they are transferred to Supermax, staff psychologist Terry Jorgenson evaluates plaintiff and concludes that he is clear for transfer despite past diagnoses of post-traumatic stress disorder and borderline personality disorder. Jorgenson's evaluation is that plaintiff is malingering. He does not discuss plaintiff with defendant Bertrand before reaching his conclusions.

April 25, 2000. The Green Bay program review committee (defendants Staudenmaier, Novitski, Delvaux and Donovan) holds a hearing and assigns plaintiff to Supermax, finding that plaintiff has a history of threatening behavior and group resistance and that he received a major conduct report on March 23, 2000, for threatening the warden. The committee finds that plaintiff has been clinically cleared for transfer and recommends that he stay at Supermax until he develops "acceptable standards of conduct and behavior that will allow [him] to live and function in a normal institutional setting." Puckett approves the recommendation immediately following the committee meeting. Plaintiff is transported to Supermax.

## OPINION

In order to prevail on a motion for a preliminary injunction, the moving party must show 1) more than a negligible chance of success on the merits and 2) no adequate legal remedy and irreparable injury if preliminary relief is denied. Once he establishes this much, the court must then consider 3) the balance of hardships between the parties (who would suffer more: the defendant if the plaintiff obtains a preliminary injunction or the plaintiff if denied one); and 4) the public interest. Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11-12 (7th Cir. 1992). The Prison Litigation Reform Act limits the scope of preliminary injunctive relief available in challenges to prison conditions and treatment. The act provides that

> Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief . . . .

18 U.S.C. § 3626(a)(2).

1. Chance of success and irreparable harm

It is undisputed that a prison official who takes retaliatory action against a prisoner for exercising a constitutional right may be held liable to that prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The difficulty is in the proof. Retaliation is

hard to establish; defendants rarely admit that they took an adverse action because they wanted to punish the plaintiff for his legally protected acts. One of the ways in which a plaintiff may proceed is by alleging a chronology of events from which a factfinder could infer retaliation. Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994). One of the ways in which he may *not* proceed is by alleging merely the ultimate fact of retaliation. Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985). His burden is that of persuading a factfinder that his "protected conduct was a motivating factor" for the retaliation and that "the events would have transpired differently absent the retaliatory motive." Babcock, 102 F.3d at 275.

Plaintiff argues that the two-year chronology of his treatment in the Wisconsin state prison system shows that he has been the victim of retaliation by defendants and that the retaliation was motivated by the inmate complaints he filed and the letters he wrote to the media and to legislators. It is possible to read the timeline of events as showing that Warden Bertrand and the members of the program review committee reached the limits of their endurance with plaintiff's prolific writings and decided to punish him for his frequent complaining inside and outside the prison. Although questions remain about what, if anything, the members of the program review committee knew about plaintiff's outside writings to the media and to the legislature or about his inmate complaints, plaintiff has proposed facts that defendants dispute but that a jury might believe and consider evidence that the committee members not only knew about the various writings but took the actions

they did because of the writings. For example, plaintiff has submitted a letter from a social worker at Green Bay, who wrote plaintiff on January 27, 2000, that defendant Staudenmaier had told the social worker that she thought plaintiff was undermining the system by writing about it to persons outside the institution. If the social worker testifies at trial, the letter may be considered by the jury as an admission by this defendant.

In addition, plaintiff has proposed facts that, if believed, suggest that he was not an appropriate subject for transfer to Supermax because of his history of mental and emotional illness. He has proposed as fact the opinion of Ron Edwards, a social worker at Supermax, whose job is to screen inmates coming to Supermax to determine whether the placement is appropriate. According to Edwards, plaintiff did not fit the criteria for placement at Supermax and officers at Green Bay erred in relying on conduct reports issued at the Fox Lake Correctional Institution, where plaintiff had been incarcerated before he went to Green Bay. One of these reports had been appealed and plaintiff had been found not to have taken an active part in the demonstration. Also, plaintiff had not been convicted on an alleged threat to harm another inmate because the threat was found to be too vague. If a jury were to find that plaintiff was not properly evaluated as suitable for transfer to Supermax *and* that the program review committee members were aware of the improper evaluation but proceeded to recommend him for transfer anyway, the jury might conclude that the committee members were acting for improper reasons.

Plaintiff has proposed facts to the effect that defendant Bertrand and his secretary made it known to Wellens, plaintiff's social worker, that Bertrand was angry and distressed over plaintiff's complaints about his mail and about his efforts to publish his written works. Again, if plaintiff can prove through Wellens that Bertrand had expressed such opinions and the members of the program review committee were aware of them, a jury might consider this as evidence that Bertrand wanted to get plaintiff out of the Green Bay facility and that the members of the program review committee acted as they did because of Bertrand's wishes.

On the other hand, a reasonable jury might find that the chronology indicates that Bertrand took in stride the complaints plaintiff filed, as well as the letters he wrote to the press and legislature, until he became aware of plaintiff's letter to Wellens, expressing his frustration with Bertrand and the possibility that he might find a way to hurt him or one of his staff. A jury might find that at that point, the warden and other prison officials changed their view of plaintiff as someone who confined himself to speaking out against perceived abuses to someone who presented a physical threat to the safety of the Green Bay staff. If, in addition, the jury found that the Program Review Committee had no reason to think that plaintiff was not a proper subject for placement at Supermax, it would be justified in finding that the committee acted for legitimate reasons in recommending plaintiff's transfer.

A good deal of the "evidence" that plaintiff argues supports his claim of retaliation

is weak at best. For example, he notes that his name was moved up the list for out-of-state transfers on March 2, 2000, the same day he wrote to various Wisconsin newspapers, saying that the state uses out-of-state transfers to silence inmates who speak out against abuses in the prison system. First, there is no evidence that his name was moved up the list in fact or that if it was, it was moved up by any one of the defendants or by anyone acting at the direction of any defendant. Second, the timing seems to refute retaliation, rather than support it. Things would have had to move more quickly in the prison bureaucracy than they usually do to support plaintiff's theory, which depends upon proof that a person in the mailroom read plaintiff's letter to the newspapers and reported it immediately to defendant Bertrand, who read the letter immediately and made the immediate decision to move plaintiff up the list.

I cannot say that plaintiff has no chance of proving that his transfer to the most punitive institution in the Wisconsin prison system was the result of retaliation for his constitutionally protected writing but neither can I say that he has better than a negligible chance of doing so, given his threatening letter of May 13. Therefore, I must deny his motion for a preliminary injunction.

ORDER

IT IS ORDERED that plaintiff Daniel Harr's motion for a preliminary injunction is

DENIED, as is the motion of defendants to strike the affidavit of Dr. Gerald Wellens. A scheduling conference will be held on January 9, 2002 at 4:00 p.m. in Courtroom 250, to discuss a trial date.

Entered this 31st day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge