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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THOMAS OVERTON and ROMEO HARDIN, Plaintiffs, vs. LOUIS GALLOWAY and DON LYNCH, Defendants.	**No. 4:01-cv-40225** **ORDER DENYING PLAINTIFFS' MOTIONS TO AMEND AND FOR TEMPORARY RESTRAINING ORDER AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Thomas Overton and Romeo Hardin bring this action pro se under 42 U.S.C. § 1983, arguing Defendants Louis Galloway and Don Lynch violated their First Amendment right to freedom of expression and their Fifth Amendment, Sixth Amendment, and Fourteenth Amendment rights to be free from retaliation for the exercise of First Amendment rights. Plaintiffs seek damages, injunctive relief, costs, and fees.

Defendants moved for summary judgment on February 24, 2003. The motion related only to Galloway's and Lynch's review of Overton's and Hardin's mail. It did not concern a claim challenging the prison's shutdown of the red star mail system. Plaintiffs Overton and Hardin filed an amended complaint in April 2003, which included no allegation regarding the red star mail system. After a hearing on the matter, Defendants filed a supplemental motion for summary judgment on July 3, 2003. The Court

then allowed counsel representing Plaintiff Overton to withdraw on August 19, 2003. Plaintiff Overton thereafter filed a motion to amend the complaint and a motion for temporary restraining order, which Defendants resist. Overton filed another motion to amend the complaint on October 2, 2003, and the time for Defendants to resist the motion has not yet expired. For the following reasons, the Court **denies** Plaintiffs' motions and **grants** Defendants' motions.

MOTIONS TO AMEND AND FOR TEMPORARY RESTRAINING ORDER

Overton seeks to add John Mathes, Warden of the Iowa State Penitentiary (ISP), as a defendant. Overton alleges that in May 2003, he filed a grievance with Mathes about false disciplinary charges. Mathes answered the grievance and then referred to the Attorney General's office for prosecution a December 2002 disciplinary matter in which Overton bit a correctional officer. In July 2003, the Attorney General's office filed criminal charges against Overton for the assault. Those charges remain unresolved. Overton alleges Mathes sought prosecution in retaliation for Overton's complaints about prison officials. He seeks an order transferring him to another institution. Overton also seeks to add Todd Eaves, Joe Lampe, Charles Harper, Scott Poole, and Brad Allen as defendants for their alleged roles in attacking Overton in December 2002 and then covering up the attack by falsely disciplining Overton.

Mathes, Eaves, Lampe, Harper, Poole, and Allen were not named as defendants in the amended and substituted complaint, and Overton does not allege he exhausted any of his state remedies concerning his claim against these persons, as required by 42 U.S.C. § 1997e(a). The Court denies Overton's request to add them as defendants. See Fed. R. Civ. P. 15(a); cf. Younger v. Harris, 401 U.S. 37 (1971) (discussing abstention when there are ongoing state judicial proceedings).

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To preclude the entry of summary judgment, the non-movant must make a sufficient showing on every essential element of its case for which it has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Continental Grain Co. v. Frank Seitzinger Storage, Inc., 837 F.2d 836, 838 (8th Cir. 1988). The nonmoving party must go beyond the pleading and by affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. The quantum of proof that the nonmoving party must produce is not

precisely measurable, but it must be "enough evidence so that a reasonable jury could return a verdict for the nonmovant." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). On a motion for summary judgment, the court views all the facts in the light most favorable to the nonmoving party and gives that party the benefit of all reasonable inferences that can be drawn from the facts. United States v. City of Columbia, Mo., 914 F.2d 151, 153 (8th Cir. 1990); Woodsmith Publ'g Co. v. Meredith Corp., 904 F.2d 1244, 1247 (8th Cir. 1990).

SUMMARY OF MATERIAL FACTS

Except where noted, the following facts are undisputed or taken in the light most favorable to Plaintiffs. Plaintiff Romeo Hardin and Plaintiff Thomas Overton are inmates at ISP. Defendants Louis Galloway and Don Lynch are investigators at ISP. In May 2001, Hardin and Overton filed the instant lawsuit.

I. Romeo C. Hardin.

A. Mail Confiscated in 1997.

On July 23, 1997, a search warrant issued for a letter from Hardin to anther inmate. (Defs.' Supp. App. at 30-32; Galloway Supp. Aff. & Ex. I.) Hardin avers he filed a grievance about the seized letters. Officials told him the letters were being held for investigation of a criminal matter, and they could be held for up to three years. Hardin avers that in 2000, when no criminal charges were filed, he asked for the letters,

but prison officials have not returned the letters, and Galloway has not responded to Hardin's requests for the letters. (Hardin Aff. ¶ 3.) Hardin has not included in this summary judgment record his grievances, responses to them, or any written request to Galloway about them. In Iowa, Hardin may seek return of the intentional or negligent deprivation of property through the Iowa Tort Claims Act, Iowa Code Chapter 669. Hardin also may seek return of property seized pursuant to a warrant through Iowa Code section 809.3.

B. March 27, 2001, Letter.

Galloway seized a letter Hardin mailed to his mother, Laura Hardin, on March 27, 2001. The letter included a five-page document entitled, "Articles of Incorporation of Guns Away from Schools, Inc." The document was similar to one inmate Overton sent to Laura Hardin that Galloway also seized on March 27, 2001. Galloway surmised that Overton gave Hardin the five-page document to mail to Laura Hardin, in hopes that either Overton's or Hardin's letter would reach Laura Hardin. (Defs.' App. at 17-21, Ex. A.) Hardin was disciplined with sixteen days loss of good time and ten days of disciplinary detention in hearing number 01-03-155 for violating prison rules against complicity to enter into contracts, agreements, or to operate a business. (Defs.' App. at 21, Ex. A.) Hearing number 01-03-155 has not been reversed or invalidated. (Defs.' App. at 14, Stockbridge Aff. ¶ 4.)

C. Religous Mail.

Without giving a particular date, Hardin alleged in his amended and substituted complaint that Galloway seized Hardin's outgoing mail that contained references of a religious nature. Defendants admit Hardin was disciplined for unauthorized group or gang conduct on several occasions.

In response to Defendants' first motion for summary judgment, Hardin filed an affidavit stating that on May 10, 2002, Galloway seized a letter Hardin wrote to Kentrell Baker because Hardin signed it, "Chief Lord". Galloway wrote Hardin a report for the letter, stating "Chief Lord" referred to gang activity with the Vice Lords. Hardin avers the letter did not discuss matters related to gangs, and he is not a member of the Vice Lords. Hardin avers "Chief Lord" is a religious reference based on his religion, "God's Bodies of Earth", which is part of the "Five Percent Nations of God". Hardin avers it is a pen name, and he has extensive copyrighted material for it. The discipline against Hardin was upheld based on Galloway's word. Hardin does not state what discipline he received or whether the discipline was later overturned. (Hardin Aff. ¶¶ 4-5.) Defendants have not responded to the statements in Hardin's affidavit.

On March 28, 2003, Galloway seized mail Hardin intended to send to Laura Hardin. The envelope included two letters from Hardin and a letter from "Ruth" to inmate Hardin. One of Hardin's letters began "Dear Minister". Galloway recognized that

although the greeting appeared religious, the title "Minister" can denote a position of leadership in a gang. Galloway feared Hardin, who Galloway knew to be a member of the Vice Lords gang, was asking the "Minister" to verify the rank of another inmate in the institution. The Vice Lords gang is a group that ISP officials view as a security threat to the institution. Hardin, however, avers he is not a member of the Vice Lords. Galloway also was concerned about references to "Alamin" in the letter. Although the reference to Alamin was mixed with discussion of Islam, Galloway believed "Alamin" referred to the Vice Lords at ISP in general or to a smaller group at ISP known as the "Almighty and Unknown Vice Lords". It is against prison rules to send more than one letter at a time and to send mail to third parties at another address. In hearing number 03-04-146, an administrative law judge found Hardin misused the mail and engaged in unauthorized group or gang conduct, in violation of prison rules. Hardin was disciplined with ninety days loss of good time and ninety days of disciplinary detention. Hearing number 03-04-146 has not been reversed or invalidated. (Defs.' Supp. App. at 9, 11-18, Ex. F, Stockbridge Supp. Aff.)

On May 23, 2003, Galloway seized mail from Hardin to someone in Birmingham, Alabama. Based on his training and experience, Galloway believed the letter mixed references to Islamic and Muslim sects with references to the Vice Lords gang, such as "Black and Gold", "Lords", "Lord", and "Chief Lord". Despite Hardin's protest that the

references were merely religious in nature, an administrative law judge found Hardin engaged in unauthorized group or gang conduct, in violation of prison rules. In hearing number 03-06-30, Hardin was disciplined with ninety days loss of good time and ninety days disciplinary detention. Hearing number 03-06-30 has not been reversed or invalidated. (Defs.' Supp. App. at 10, 19-22, Ex. G, Stockbridge Supp. Aff.)

D. Mail from National Black United Front.

In the fall of 2002, Hardin wrote to the National Black United Front. He received a letter from the National Black United Front that included a copy of the "Declaration of Genocide by U.S. Government Against the Black Population of the United States". Hardin states the "Declaration" was removed from the letter. (Pls.' App. at 10, 16, Ex. 3.) Hardin wrote his Unit Manager, asking why the "Declaration" had been removed. Hardin still has not received the document. (Hardin Aff. ¶ 6.) The summary judgment record does not include a copy of the notice of rejection of the "Declaration", or any document suggesting Galloway or Lynch seized the "Declaration".

Galloway admits that literature from the National Black United Front was in Hardin's mail that was the subject of discipline in hearing number 03-06-30, in the year 2003. (Defs.' Supp. App. at 30, 34-38, Galloway Supp. Aff. ¶ 5, Ex. J.) Galloway states that if information from the National Black United Front was seized in the fall of 2002, Hardin would have received notice of it, and mail from the National Black United

Front would not be denied without notice or individual examination of it. (Defs.' Supp. App. at 30, Galloway Supp. Aff. ¶¶ 3-4.) There is a policy for filing grievances at ISP. (Defs.' Supp. App. at 57-68, Ex. M.) Grievance Officer David DeGrange avers that Hardin files many grievances at ISP, but there is no record of a grievance from Hardin after July 2002 regarding the National Black United Front and mail that Hardin did not receive. (Defs.' Supp. App. at 55, DeGrange Supp. Aff. ¶¶ 4-5.)

E. January 2003 Discipline.

In early January 2003, Galloway seized a letter Hardin attempted to mail and wrote him a disciplinary report on it. Although the summary judgment record does not include a copy of the letter, it appears Hardin was attempting to send the letter to Heather Alvarez. In hearing number 03-01-48, Hardin presented evidence that on January 8, 2003, another inmate, Cliff Kite, also tried to contact Heather Alvarez, but Kite received only a rejection notice and a warning that future attempts to contact Alvarez would result in disciplinary action. Kite was attempting to contact Alvarez at an address in Eldon, Iowa. Hardin avers that Kite had filed no lawsuit against Galloway. (Hardin Aff. ¶ 7.) Because Kite did not indicate Alvarez was on work release, Galloway gave Kite only a warning. In Hardin's case, however, Galloway wrote Hardin a disciplinary report. (Defs.' Supp. App. at 39-40, Ex. K.) On January 10, 2003, the administrative law judge dismissed hearing number 03-01-48 because there was no evidence Hardin received an

earlier warning like Kite received. (Pls.' App. at 17, Ex. 4.) Galloway avers he did not give Kite a report because Kite's letter was addressed to Alvarez at a nonprison address. Galloway gave Hardin a report because he addressed his letter to a residential facility. (Galloway Supp. Aff. ¶¶ 6-8.)

On January 13, 2003, Galloway seized a letter Hardin sent to Laura Hardin because Hardin was trying to communicate with a third person named Heather Marvin, also known as Heather Alvarez, and Tammy Greyowl, in violation of prison rules and previous warnings not to contact Greyowl or persons at other institutions. For his misuse of the mail on January 13, 2003, an ISP administrative law judge disciplined Hardin in hearing number 03-01-89 with sixteen days loss of good time and referral to the classification committee with a recommendation that Hardin be placed in protective custody status. Hearing number 03-01-89 has not been reversed or invalidated. (Defs.' Supp. App. at 10, 23-28, Ex. H, Stockbridge Supp. Aff.)

II. Thomas Overton.

A. December 5, 2000, Letter.

Galloway seized a letter inmate Christner sent to Tom Christner that said, "Hey Tom, I am going to have this Dude write you a friendly letter. Send him 40 bucks please Tom. He is helping me a lot with my case." (Defs.' App. at 22, Ex. B.) Upon investigation, Galloway discovered Overton also sent Tom Christner a letter stating, "I'll be

filing postconviction real soon on my case and wanted you to know that." Christner and Overton resided in adjacent cells. Galloway believed Overton was the intended recipient of the $40.00. Overton admitted helping inmate Christner with the case but denied asking for any payment. Inmate Christner admitted trying to set up the $40.00 payoff but denied Overton knew about it. In hearing number 00-12-19, the administrative law judge disbelieved the inmates and found Overton misused the mail, in violation of prison rules. He disciplined Overton with ninety days loss of jailhouse lawyer privileges but no loss of good time. Hearing number 00-12-19 has not been reversed or invalidated. (Defs.' App. at 15, 22-28, Ex. B, Stockbridge Aff.)

B. December 6, 2000, Letter.

Lynch seized a letter addressed to Overton and received at ISP on December 6, 2000. The letter was from Yohan Webb, of Chicago, Illinois. Webb was discharged from ISP on September 10, 2000. Lynch believed the letter was in fact from another inmate at ISP, and Webb was acting merely as a courier for the two inmates. Prison policy forbids inmates from writing one another because of security concerns. "Inmates from different statuses may pass along details related to escapes, assaults, and other matters." Lynch confiscated the letter because it relayed information to Overton about another inmate at ISP. (Defs.' App. at 46-49, Lynch Aff., Ex. E.) Overton believes the sole content of the letter was a copy of a ruling in Romeo Hardin's postconviction action;

it did not include writings or ideas from another inmate. (Pls.' App. at 18, Overton Aff. ¶ 2.) Overton was not disciplined for the incident. Officials at ISP have no record of Overton filing any grievance while at ISP. (Defs.' Supp. App. at 55, DeGrange Aff. ¶ 3.)

C. December 7, 2000, Letter.

Galloway seized a letter Overton mailed to Patricia Overton on December 7, 2000. Galloway thought the material in the mailing concerned establishing a nonprofit business. Believing the material may have violated prison rules prohibiting inmates from establishing or operating a business, Galloway issued Overton a "Notice of Rejection of Outgoing Correspondence". Galloway informed Overton he could consult Treatment Director Bernard Eaves about the letter. Galloway later learned the material was returned to Overton and no disciplinary report was filed against Overton. (Defs.' App. at 42-45, Ex. D.) Overton avers that ISP contract attorney, Peter Hansen, and ISP's Treatment Director told Overton his nonprofit organization did not constitute a "business". (Pls.' App. at 18, Overton Aff. ¶ 3.) Officials at ISP have no record of Overton filing any grievances while at ISP. (Defs.' Supp. App. at 55, DeGrange Aff. ¶ 3.)

D. March 27, 2001, Letter.

Galloway seized two letters Overton mailed to Laura Hardin on March 27, 2001. One letter from was inmate Romeo Hardin to Laura Hardin. Hardin's letter included a five-page document entitled, "Articles of Incorporation of Guns Away from Schools,

Inc." The document listed Overton as a member of the board of directors of the corporation, and the letter referred to Overton's nickname, "OT". (Defs.' App. at 29-30, Ex. C.) The other letter was from Overton to Laura Hardin. Overton asked Laura Hardin to be director of the corporation, which Overton characterized as a nonprofit organization. Overton wrote to Laura Hardin, "It's very simple and there is lots of money . . . . I'll show you how to open the bank account, keep records, get contributions of cars, airline service, computers, houses, etc. It's all legal because I got approved by the Secretary of State in Iowa." (Defs.' App. at 33, Ex. C.) Galloway discovered the Secretary of State of Iowa had no articles of incorporation for Guns Away from Schools, Inc. In issuing Overton a disciplinary report, Galloway wrote Overton "seems intent o[n] turning a noble idea into personal gain." (Defs.' App. at 36-37, Ex. C.)

Based on the similar content of the letters seized from Overton and Hardin on March 27, 2001, Overton's similar letter seized December 7, 2000, and Galloway's conversation with the office of the Secretary of State of Iowa, Galloway wrote Overton a disciplinary report for the mail. In hearing number 01-03-156, an administrative law judge found Overton violated prison rules against entering into contracts, agreements, and operating a business. As a result, Overton was disciplined with sixteen days loss of good time and ten days of disciplinary detention. Hearing number 01-03-156 has not been reversed or invalidated. (Defs.' App. at 15, 29-41, Ex. C, Stockbridge Aff. ¶ 8.)

E. February 4, 2002, Cell Search and Seizure.

Officers conducted a targeted search of Overton's cell on February 4, 2002, while Overton was in a meeting with an agent of the Iowa Division of Criminal Investigation. (Pls.' App. at 19, Overton Aff. ¶ 4.) A debt list was taken during the search, and Overton was disciplined for possessing it. The discipline was later dismissed. (Defs.' Supp. App. at 45-48, Ex. L.) Neither Galloway nor Lynch were involved in the February 4, 2002, search or the discipline. (Defs.' Supp. App. at 31, 54, Galloway Supp. Aff. ¶ 9, Lynch Supp. Aff. ¶ 2.)

DISCUSSION

I. Return of Property.

Defendants argue that Hardin's claim for mail confiscated in 1997 amounts to a request for return of property for which a meaningful post-deprivation remedy is available, and the claim is beyond the statute of limitations in any event. The Supreme Court has held that neither intentional nor negligent deprivations of property violate due process if meaningful state post-deprivation remedies for the losses are available, because the post-deprivation state remedies provide due process of law. See Hudson v. Palmer, 468 U.S. 517, 533 (1984) (intentional deprivations); Parratt v. Taylor, 451 U.S. 527, 543 (1981) (negligent deprivations); see also Iowa Code Ch. 669, 670 (Iowa's statutory tort claims procedure). Hardin has an adequate post-deprivation remedy in the Iowa State

Tort Claims Act, Iowa Code Chapter 669, and he also could have sought return of property seized pursuant to a warrant through Iowa Code section 809.3. Because Hardin has an adequate post-deprivation remedy in state court, the court will dismiss his claim for relief under section 1983.[1]

II. February 4, 2002, Incident.

Defendants argue that neither of them were involved in the search of Overton's cell on February 4, 2002; therefore, they cannot be held liable for any constitutional violations stemming from it. They add that because prison officials eventually dismissed the discipline resulting from the February 4, 2002, search, Overton received all the process due to him. There is no evidence in this summary judgment record that either Galloway or Lynch were involved in the February 4, 2002, incident. The Court will therefore dismiss Overton's claim regarding the incident.

III. Exhaustion.

Defendants ask the Court to dismiss all of Overton's claims because he never exhausted his administrative remedies before bringing suit on them. As for Hardin, Defendants argue Hardin failed to exhaust administrative remedies before bringing suit

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[1] Because the Court concludes Hardin may seek relief through state post-deprivation procedures, the Court does not address Defendants' argument that Hardin's claim is barred by the statute of limitations. See Wycoff v. Menke, 773 F.2d 983, 984 (8th Cir. 1985) (applicable statute of limitations for claims brought in Iowa under 42 U.S.C. § 1983 is two years), cert. denied, 475 U.S. 1028 (1986).

about mail from the National Black United Front in the fall of 2002, and the literature from the National Black United Front was the subject of disciplinary proceedings against Hardin that were not reversed or invalidated.

Prisoners challenging conditions of their confinement must exhaust available administrative remedies before filing a suit under 42 U.S.C. § 1983. Title 42 U.S.C. § 1997e(a) provides:

> No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] 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.

42 U.S.C. § 1997e(a). Section 1997e(a)'s "exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). Failure to exhaust all administrative remedies is an affirmative defense, and defendants have the burden of pleading and proving it. Foulk v. Charrier, 262 F.3d 687, 697 (8th Cir. 2001).

Hardin presents nothing to counter Defendants' evidence that he failed to exhaust his administrative remedies in retrieving mail sent to him from the National Black United Front in the fall of 2002. There is no genuine issue of fact whether Hardin exhausted his available administrative remedies with regard to the mailings. Moreover, there is no evidence either Defendant was involved in the fall 2002 confiscation of material sent to

Hardin from the National Black United Front. Defendants are therefore entitled to judgment as a matter of law on Hardin's claim that Defendants wrongfully withheld literature from the National Black United Front. The Court will dismiss the claim with prejudice. See Mark v. Nix, 983 F.2d 138, 140 (8th Cir. 1993) (per curiam) (no liability for defendants who were not responsible for confiscation).

Although Defendants do not address in particular Galloway's seizure of a letter Hardin intended to send to Kentrell Baker on May 10, 2002, the Court concludes the claim must be dismissed because Hardin does not allege he exhausted his administrative remedies before filing suit about the incident. The Court will dismiss the claim without prejudice based on 42 U.S.C. § 1997e(a).

As for Overton, he presents no evidence suggesting he exhausted his available administrative remedies on any of his claims before filing suit. They can be dismissed without prejudice on this ground, alone. Moreover, as discussed in the following sections, Overton's allegations regarding seized mail must be dismissed on other grounds as well.

IV. Discipline and Retaliation.

Defendants argue the claims Overton and Hardin bring regarding confiscated mail that was the subject of disciplinary actions must be dismissed if those actions were not reversed or invalidated. Likewise, they argue that Overton's and Hardin's retaliation

claims in connection with those disciplinary actions also must be dismissed. As for the confiscations that did not result in discipline, Defendants argue prison officials had legitimate penological reasons to seize the mail.

A. Discipline Involving Loss of Good Time.

In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the United States Supreme Court held that "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." The decision in Heck is rooted in the principle that a prisoner challenging the fact or length of imprisonment must seek relief through a petition for a writ of habeas corpus and not through an action under section 1983. Id. at 481; see also Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (sole remedy to obtain earlier release is through habeas petition). The Court extended the rule of Heck to prison disciplinary decisions in Edwards v. Balisok, 520 U.S. 641, 645-48 (1997). The prisoner in Edwards challenged the procedures used in a disciplinary proceeding against him that resulted in, among other things, his loss of good time. Even though the inmate sought damages and future injunctive relief but not restoration of good time credits, the Supreme

Court ruled the inmate could not bring a section 1983 suit challenging the disciplinary decision until the decision was invalidated because success on his section 1983 action would necessarily imply the invalidity of his lost good time credits. Id. at 648.

Defendants would have this Court impose the favorable termination requirement in Heck on every disciplinary decision. The caselaw does not support them. The opinions on which Defendants rely, Sheldon v. Hundley, 83 F.3d 231, 233 (8th Cir. 1996), and Portley-El v. Brill, 288 F.3d 1063, 1066-67 (8th Cir. 2002), followed the favorable termination requirement in Heck, but both Sheldon and Portley-El involved loss of good time. Although the Court of Appeals for the Eighth Circuit has not specifically addressed whether Edwards extends to prison discipline that does not involve loss of good time, all but one of the appellate courts to consider the issue have ruled that Edwards does not apply to such prison disciplinary decisions. See Ramirez v. Galaza, 334 F.3d 850, 856-58 (9th Cir. 2003) (discussing cases). The undersigned agrees with the reasoning of the majority of those cases and concludes Edwards applies only when the success of a prisoner's section 1983 challenge would undermine the fact or length of that inmate's imprisonment. Consequently, Edwards is relevant only to the discipline resulting in lost good time, that is, Hardin's challenges regarding mail taken on March 27, 2001, January 13, 2003, March 28, 2003, and May 23, 2003, and Overton's challenges regarding mail taken on March 27, 2001. Plaintiffs' First Amendment claims are "so

entangled with the propriety of the disciplinary result, which triggered the loss of good-time credits, that ruling in [plaintiffs'] favor on First Amendment grounds would necessarily imply the invalidity of the disciplinary result and the lengthened sentence." Sheldon, 83 F.3d at 233; see also Henderson v. Baird, 29 F.3d 464, 469 (8th Cir. 1994) (if prison official shows "some evidence" of rule violation, inmate's retaliation claim must fail), cert. denied, 515 U.S. 1145 (1995). The Court, therefore, will dismiss without prejudice Overton's and Hardin's claims related to discipline that resulted in lost good time. Plaintiffs may reassert the claims in a new section 1983 case if the loss of good time is invalidated.

B. Retaliation for the Exercise of First Amendment Rights.

Inmates retain limited First Amendment rights. [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). Four factors the court considers in this evaluation are (1) whether a valid, rational connection exists between the regulation and the penological interest justifying it; (2) whether the inmate has an alternative means of exercising the right; (3) whether accommodation of the right would significantly affect other inmates, guards, and prison resources; and (4) whether there is a ready alternative to the challenged regulation at a de minimis cost to the penological interest. Id. at 89-91; see also Leonard v. Nix, 55 F.3d 370, 374-75

(8th Cir. 1995) ("Prison rules censoring a prisoner's personal outgoing mail are justified only if the regulation or practice in question furthers an important governmental interest of security, order, or rehabilitation, and the limitation on the prisoner's retained First Amendment rights must be no greater than necessary to protect the governmental interest."). In balancing the inmate's rights and security of the institution, the court gives great deference to prison officials' judgment. See Timm v. Gunter, 917 F.2d 1093, 1099 (8th Cir. 1990), cert. denied, 501 U.S. 1209 (1991).

"Conduct that retaliates against the exercise of a constitutionally protected right is actionable, even if the conduct would have been proper if motivated by a different reason." Cody v. Weber, 256 F.3d 764, 771 (8th Cir. 2001). Prison officials cannot "impose a disciplinary sanction against a prisoner in retaliation for the prisoner's exercise of his constitutional right." Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993), cert. denied, 512 U.S. 1209 (1994). To prevail on their section 1983 retaliation claims, Plaintiffs must prove they were engaging in protected conduct, Defendants took adverse action against them, and that retaliation was the actual motivating factor behind the adverse action; that is, but for the exercise of First Amendment rights, mail would not have been confiscated and they would not have been punished. See id.; see also Sisneros v. Nix, 95 F.3d 749, 752 (8th Cir. 1996) ("This is a 'but for' test dealing with motive, not causation."). In the context of prison disciplinary decisions, "a defendant may successfully defend a retaliatory-discipline claim by showing 'some evidence' that the

inmate actually committed a rule violation." Moore v. Plaster, 266 F.3d 928, 931 (8th Cir. 2001), cert. denied, 535 U.S. 1037 (2002); see also Henderson, 29 F.3d at 469. At the summary judgment stage, the court views the evidence in the light most favorable to plaintiffs and considers whether a reasonable jury could find that plaintiffs were engaging in protected behavior and whether the "but for" test is satisfied.

Turning to Overton's remaining First Amendment claims, the Court first observes Overton failed to exhaust his administrative remedies regarding them, and they can be dismissed without prejudice on that ground. Second, the Court concludes there are no genuine issues of material fact, and Defendants are entitled to judgment as a matter of law on the claims; therefore, they will be dismissed with prejudice.

1. December 5, 2000, Letter. The record includes Galloway's detailed description of the language in Overton's December 5, 2000, letter intimating that Overton was seeking payment for helping another inmate with a postconviction action, as well as Overton's admission that he was helping the other inmate, the inmate's admission that he tried to pay Overton, and the inmate's letter paving the way for payment. There was some evidence that Overton misused the mail. Both his free speech and retaliation claims regarding the December 5, 2000, letter are without merit, and they will be dismissed with prejudice.

2. December 6, 2000, Letter. Defendants have identified legitimate security concerns for their rule forbidding inmates from writing one another, including

inmate communication about escapes and assaults. Overton does not dispute that Webb was merely the courier for Hardin to mail his postconviction action to Overton. Upon consideration of the Turner factors, and giving prison officials broad discretion to manage their institutions, see Timm, 917 F.2d at 1099, the decision to reject the mail from Webb was reasonably related to prison security. Overton's free speech and retaliation claims regarding the December 6, 2000, letter will be dismissed with prejudice.

3. December 7, 2000, Letter. Overton's December 7, 2000, letter to Patricia Overton was ultimately returned to Overton after Galloway confiscated it. Inmates have no First Amendment right to operate a business while in prison, and prison officials could rightly withhold the letter because Overton attempted to set up a business. See Garland v. Polley, 594 F.2d 1220 (8th Cir. 1979). As Defendants point out, several months after Overton's letter was confiscated on December 7, 2000, Overton again tried to mail a letter that attempted to set up a business. On that occasion, the letter was taken, and Overton was disciplined. Galloway reasonably believed Overton violated prison rules against operating a business; he did not seize it in violation of Overton's right to free speech, and no reasonable juror could find Galloway seized the letter in retaliation for the exercise of a constitutional right. Overton's claim regarding the December 7, 2000, letter will be dismissed with prejudice.

C. Equal Protection.

The equal protection guarantee essentially means all persons similarly situated should be treated alike. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440

(1985). To prove an equal protection violation, a plaintiff must show that he was treated differently than similarly situated inmates and that there was no rational basis related to a legitimate state purpose for the unequal treatment. Wishon v. Gammon, 978 F.2d 446, 450 (8th Cir. 1992).

Hardin complains that in January 2003 Galloway wrote Hardin a disciplinary report for mailing a letter to someone but gave only a warning to a different inmate who wrote a letter to the same person at about the same time. Galloway wrote Hardin the report because prison rules prohibit inmates from writing inmates at other institutions, and the address on Hardin's letter was an institution. There is no dispute that, unlike Hardin, the other inmate listed the person's address as a street address rather than a prison address. There is no suggestion on this summary judgment record that the other inmate had been sanctioned for violating that rule. Galloway had a rational basis for treating the inmates differently, and the Court concludes there is no equal protection claim. Hardin's claim about the January 2003 discipline will be dismissed.

D. Summary.

There are no genuine issues of material fact. Hardin has an adequate post-deprivation remedy for mail confiscated in 1997; therefore, he cannot challenge the seizure in this section 1983 action. Hardin cannot challenge the discipline resulting from mail taken on March 27, 2001, January 13, 2003, March 28, 2003, and May 23, 2003, because success on those claims would imply the invalidity of his lost good time, and

Hardin has not shown the disciplinary decisions have been invalidated. Hardin's retaliation claims for those incidents likewise fail. Hardin failed to exhaust his administrative remedies before bringing suit about mail seized on May 10, 2002, and mail seized from National Black United Front taken in the fall of 2002. Furthermore, neither Defendant was involved in the confiscation of material from National Black United Front. Finally, Hardin suffered no equal protection violation with regard to mail Galloway seized in January 2003. Defendants are entitled to judgment as a matter of law on all of Hardin's claims.

Overton's claims can be dismissed for failure to exhaust administrative remedies. In addition, neither Defendant was involved in the February 4, 2002, search and seizure in Overton's cell; therefore, they will not be held liable for it. Overton cannot challenge the discipline resulting from mail taken on March 27, 2001, because success on that claim would imply the invalidity of his lost good time, and Overton has not shown the disciplinary decision has been invalidated. Overton's retaliation claims for that incident likewise fail. Galloway was justified in confiscating Overton's mail on December 5, 2000, December 6, 2000, and December 7, 2000. Defendants are entitled to judgment as a matter of law on all of Overton's claims.

O R D E R S

The Court **denies** Plaintiffs' motions to amend the complaint (Clerk's No. 95, No. 105). The Court **denies** Plaintiffs' motion for a temporary restraining order (Clerk's No. 96). The Court **grants** Defendant Galloway's and Defendant Lynch's motion for summary judgment (Clerk's No. 60), and the Court **grants** their supplemental motion for summary judgment (Clerk's No. 87).

As pleaded in Plaintiffs' amended complaint, this case no longer concerns the red star mail system. Because Defendants are entitled to summary judgment on all claims in Plaintiffs' amended complaint, the Court directs the Clerk of Court to enter judgment in favor of Defendants and against Plaintiffs on all claims. Plaintiffs' claims regarding discipline that resulted in loss of good time, and Hardin's claim regarding mail seized on May 10, 2002, are **dismissed without prejudice**. Plaintiffs' remaining claims are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated this 8th day of October, 2003.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT