IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY E. OLSON,

Plaintiff,

v.

DONALD MORGAN, RANDY SCHNEIDER and LILLIAN TENEBRUSO,

Defendants.

OPINION AND ORDER

11-cv-282-slc

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On March 28, 2011, plaintiff Jeffrey Olson, then an inmate at the Columbia Correctional Institution, was injured during an altercation with his cellmate, Thomas Russell. In this action brought pursuant to 28 U.S.C. § 1983, Olson contends that Correctional Officer Randy Schneider and his supervisor, Donald Morgan, violated Olson's rights under the Eighth Amendment by failing to protect him from Russell's attack, and that when Olson filed grievances against Schneider, Schneider retaliated by writing up Olson on conduct violations. Olson also is suing the manager of the prison's Health Services Unit, Lillian Tenebruso, alleging that she failed to provide him with proper medical treatment for injuries sustained in the fight with Russell.

Before the court is defendants' joint motion for summary judgment. As discussed below, I am granting summary judgment in favor of defendant Schneider on plaintiff's retaliation claim because there is no evidence that Schneider knew that plaintiff had filed a grievance against him. Plaintiff's claim against Tenebruso also fails because plaintiff has adduced no evidence showing that she had any personal involvement in his medical care apart from referring him to a dentist, which she did within a reasonable time.

I am temporarily staying a ruling on plaintiff's claim that Morgan and Schneider failed to protect him from the attack by Russell. I am asking defendants to submit additional evidence

and a short supplemental brief in response to assertions made by plaintiff concerning Russell's disciplinary record and psychological history. This evidence is relevant and material to the question whether defendants disregarded a known risk to Olson.[1]

Before setting out the facts, I need to address a few procedural matters. First, although Olson filed responses to defendants' proposed findings of fact, in many instances plaintiff offers merely his own conclusory assertions, without citing to any admissible evidence in the record to support those assertions. I have disregarded these responses when finding facts. In the *Procedure To be Followed on Motions for Summary Judgment*, attached to Preliminary Pretrial Conference Order, dkt. 25, it tells plaintiff in Sec. II.E.2. that "the court will not consider any factual propositions made in response to the moving party's proposed facts that are not supported properly and sufficiently by admissible evidence."[2]

Second, in several responses to defendants' proposed findings of fact, Olson accuses defendants of having failed to respond adequately to his discovery requests. However, Olson was instructed in an order entered March 22, 2012 that he was to promptly file a motion to compel in the event there were still outstanding discovery issues that were not resolved after the parties complied with the instructions in that order. *See* dkt. 67, at 2 (denying without prejudice Olson's motion to compel and explicitly setting out a three-step procedure by which plaintiff could file a new motion to compel in the event defendants did not respond adequately to his requests). Olson did not renew his motion to compel. Accordingly, to the extent that Olson complains in his submissions that defendants have withheld relevant information responsive to his discovery requests or that they have impeded his access to his own files, it is too late in the

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[1] As a point of information, today I also am issuing a summary judgment order in *Moton v. Grams,* 10-cv-666-slc, another case involving claims that CCI staff failed to protect an inmate.

[2] Even so, I have granted an exception to this rule with respect to Olson's assertions regarding Russell's history, for reasons explained below.

summary judgment process for Olson to raise such complaints. Again, with the exception of evidence pertaining to Russell's disciplinary record and his relevant mental health history, the summary judgment record is as it stands. *See* Preliminary Pretrial Conference Order, dkt. 25, at 10 ("If the parties do not bring discovery problems to the court's attention quickly, then they cannot complain that they ran out of time to get information that they needed for summary judgment or for trial.")

From the parties' submissions, I find the following facts to be material and undisputed:

## FACTS

### I. Morgan and Schneider's Alleged Failure to Protect Olson from Russell

At all times relevant to this action, plaintiff Jeffrey E. Olson was an inmate incarcerated at the Columbia Correctional Institution (CCI) in Portage, Wisconsin. In March 2011, he was housed in the Disciplinary Segregation Unit 2 (DS-2) at CCI. The DS-2 unit is a "step down," or transitional unit intended primarily to assist inmates who are finishing time in segregation status to make the adjustment to general population status.[3]

Defendant Randy Schneider was a sergeant at CCI. During the time period relevant to this lawsuit, Schneider served as the Second Shift Relief Sergeant. Schneider's post at CCI varied from day to day because he was assigned to fill in for other staff who were absent. Schneider usually worked two days a week on the DS-2 unit. The second shift runs from 2 p.m. to 10 p.m.

[3] In his brief, Olson asserts that CCI has a policy against doubling inmates in segregation cells. However, the evidence that he cites, which is just one page from that policy, does not support his assertion. The cited excerpt from the policy does not say that inmates can never be doubled in segregation, but only that inmates bearing a "Do Not Double" designation are to be given first priority for a single cell. *See* Facility Procedure #: 920.00.06, attached to Aff. of Jeffrey Olson, dkt. 74, Exh. 40.

Defendant Donald Morgan served the dual role of Administrative Captain and Segregation Captain at CCI. As Segregation Captain, he supervised the general operations of the disciplinary segregation units (DS-1) and (DS-2) and the Special Management Unit.

From March 21, 2011 to March 28, 2011, Olson shared a cell on the DS-2 unit with inmate Thomas Russell. Neither Schneider nor Morgan participated in any decision to place Olson and Russell in the same cell. In his role as Administrative Captain, however, one of Morgan's jobs was to review and participate in the decision whether an inmate is eligible to be celled with a roommate or is restricted to single-cell status. The decision whether an inmate requires a single cell is based jointly on security considerations, mental health status and treatment considerations, and occasionally on non-mental health medical considerations. At the time that Olson and Russell were celled together in March 2011, neither inmate was subject to a single-cell restriction. (The record is silent as to how that decision was reached.)

According to Olson, he wrote to Morgan on either Saturday, March 26 or Sunday, March 27, 2011, complaining about inmate Russell.[4] Morgan was not present at CCI on either of those dates; his next day at work was Tuesday, March 29, 2011.

During the early evening of Sunday, March 27, 2011, Schneider was the second shift sergeant on duty on the DS-2 unit. As Schneider was making rounds in the unit, he spoke with Olson in the library area. Olson called Schneider over to the area where he was working and they spoke for several minutes on a variety of topics: one of these topics was Russell. According to Olson, he told Schneider that

> My celly, Russell, has twice tried to swing off on me and I want him moved . . . I fear he's gonna try it again . . . he isn't taking his meds and hears voices that tell him to attack people . . . he needs his own cell.

[4] Morgan has searched his security file for correspondence from Olson concerning Russell; there is nothing in Morgan's file written before the March 28, 2011 incident.

(Schneider recounts this conversation differently. According to Schneider, Olson told him that Russell had not been "taking his meds," that when he took his meds he was a nice guy, but when he didn't, he got "weird." According to Schneider, Olson was relaxed during this conversation and explained: "I just want to help him so I'm letting you know.")

After speaking with Olson, Schneider spoke with the two correctional officers who were on duty with him that night, and who were the regularly-assigned officers to the DS-2 unit. These officers reported that they were unaware of any problems between Olson and Russell or any problems with Russell taking his medication. Nonetheless, Schneider asked the correctional officer on duty who was in charge of supervising medication distribution to make sure that Russell took his medications. Schneider did not hear any reports later that this officer had any problems with Russell's compliance.

On Monday night, March 28, 2011 at 7:48 p.m., Olson and Russell got into a fight. According to Olson, Russell attacked him. No one on CCI staff saw the fight. Morgan was gone from the institution on March 28 and did not become aware of the fight until he returned to work the next morning, Tuesday, March 29, 2011. Although Schneider was on duty that evening, he did not notice any behavior prior to the fight that would have led him to conclude that either inmate posed a danger to the other, nor did he receive any such reports from other staff. As a result of the altercation, both Olson and Russell received conduct reports for fighting.

Whenever Morgan or Schneider was present in the DS-2 unit during the brief time that Olson and Russell were cellmates, neither Morgan nor Schneider observed any concerning behavior by either inmate. No other correctional officers assigned to DS-2 reported to Morgan or Schneider any problems between Olson and Russell.

**II. Tenebruso's Alleged Failure to Treat Olson**

During the time period relevant to this case, Lillian Tenebruso was employed by the Department as Health Service Manager in the Health Services Unit (HSU) at CCI. Although she is a registered nurse, Tenebruso was not responsible for providing direct patient care: instead, she was responsible for overall operation of the HSU and managing the scheduling of services for inmates. Part of Tenebruso's responsibilities included responding to inquiries from the Institution Complaint Examiner concerning inmate complaints about their medical care. In addition, Tenebruso would sometimes respond to written Interview/Information Requests from inmates about health care questions.

Following his fight with Russell, Olson was seen that same night by the nurse on duty, Paul Ketarkus. Ketarkus examined and treated Olson's injuries, which included a damaged tooth. According to Olson, Ketarkus recommended that Olson's tooth be pulled. Ketarkus also recommended that Olson take ibuprofen but Olson asked for aspirin instead, expressing concern about potential organ damage from ibuprofen. Ketarkus declined to obtain aspirin, directing Olson to purchase it from the canteen.

On or about April 8, 2011, Olson wrote to Tenebruso, asking why he had not been prescribed aspirin as he had requested for pain in his left jaw area where Russell had struck him. In the letter, Olson mentioned that the nurse had told him that the tooth in that area should be removed, and said he had constant pain on the left side of his mouth when he chewed, but Olson did not ask for additional treatment. It is unclear exactly when Tenebruso received this letter, but on April 13, 2011, Tenebruso sent a reply to Olson, stating that he had not been prescribed a pain reliever because he had refused the medications that the nurse could give him according to protocol.

On April 14, Tenebruso sent a note to Olson indicating that she had received "several information requests from you today indicating your concern with your tooth and pain

management."[5] Tenebruso responded that if Olson wished to see a dentist, he should fill out a request to do so. On April 15, 2011, Olson sent Tenebruso an argumentative response. Interpreting the response as a request to see the dentist, Tenebruso referred Olson to the dentist on April 16, 2011. Three days later, Olson was seen at CCI by a dentist, who pulled one of Olson's teeth.

On or about April 14, 2011, Olson filed an inmate complaint in which he complained that he was being denied medical care for pain associated with his tooth. The Inmate Complaint Examiner referred Olson's complaint to Tenebruso for a response. Sometime between April 14 and May 11, 2011, Tenebruso reviewed plaintiff's medical records and responded to that complaint.[6]

On April 19, 2011, Dr. Thorpe extracted Olson's tooth #17 under local anesthesia. Tenebruso was not responsible for providing any medical care or treatment directly to Olson.

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[5] Copies of these information requests are not in the record, so it is unclear how many were sent, to whom they were addressed, what they said or when they were dated. In his responses to defendants' proposed findings of fact, Olson asserts that he wrote to Tenebruso and the Health Services Unit at least seven times *before* April 13, 2011 and informed them of "his serious medical needs and issues," and that Tenebruso "repeatedly" responded that he needed to submit a HSU Request Form and pay a co-pay before he would be seen. Plt.'s Response to Defs.' PPFOF, dkt. 73, at ¶¶ 45, 49. However, Olson has failed to support his assertion by citing to any testimony, documentation or other admissible evidence in the record. Olson's unsworn say-so is not enough to create a genuine factual dispute about his communications with Tenebruso. The court is mindful that F.R. Civ. Pro. 56(c)(4) does not require sworn affidavits and that it is an open question in this circuit what suffices to raise a genuine dispute of fact during summary judgment practice. *See, e.g., Jajeh v. County of Cook*, 678 F.3d 560, ___, n.4. (7th Cir. 2012). But Olson understands the distinction, as evidenced by his submission of his own well-typed, articulate affidavit (dkt. 74) to which he also attached 48 exhibits, (dkt. 74-2). Olson did not address this matter in his affidavit. Only Exh. 47 (dkt. 74-2 at 61, labeled by Olson as "aspirin refusal") appears to address this issue and in it, Olson simply indicates that he has jaw pain, he won't take ibuprofen, but he cannot afford to buy his own aspirin so he wants some provided and wants to know if there will be a co-pay for meds necessitated by another inmate's attack.

[6] Olson accuses Tenebruso of lying in response to the ICE's investigation when she indicated that Olson had declined the medications that the nurse had offered him when he was first seen for his injuries on March 28. There is no merit to Olson's contention. Even if Olson's medical file lacks a "Refusal of Recommended Health Care" form, Olson does not dispute that he declined to take the ibuprofen offered by the nurse and instead expressed a strong, exclusive preference for aspirin because he was concerned about organ damage.

**III. Schneider's Alleged Retaliation Against Olson**

In the weeks immediately following the March 28, 2011 altercation between Olson and Russell, Schneider received several "interview request forms" from Olson as well as notes written by Olson on blank paper. In the correspondence, Olson expressed his anger at having received a conduct report for the fight because Olson believed that only Russell should have been written up. Schneider was concerned about both the content and disrespectful tenor of the notes, so he consulted with a supervisor, Lieutenant Karna, for advice about how to handle the situation. After consulting with Karna, on April 12, 2011 Schneider issued Conduct Report Number 1960298 to Olson, charging him with disrespect and lying. This conduct report was ultimately dismissed by the hearing officer on the ground that there was insufficient evidence to support the charges.

Before April 12, 2011, Olson had used the Inmate Complaint Review System to file two grievances against Schneider: Complaint No. CCI-2011-7357 and CCI-2011-7291. Complaints filed under the ICRS are kept confidential and are opened only by the Inmate Complaint Examiner. With respect to the two complaints filed by Olson, the Inmate Complaint Examiner, Joanne Lane, rejected both on procedural grounds. She rejected Olson's first complaint because it raised multiple issues or concerned an issue that had to be resolved through the disciplinary process. She dismissed the second on the ground that the issues raised had been previously addressed in other complaints. Lane did not inform Schneider that Olson had filed these grievances against him, she did not interview Schneider about Olson's allegations and she did not refer Olson's allegations to the warden's office or to any security staff members before April 12, 2011. At the time Schneider issued Conduct Report 1960298 against Olson, he did not know that Olson had filed any inmate complaints against him.

OPINION

**I. Summary Judgment Standard**

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party. *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

**II. Failure to Protect Claim Against Defendants Schneider and Morgan**

The Eighth Amendment imposes upon prison officials a duty to protect prisoners from violence at the hands of other prisoners. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). However, because it is only the "unnecessary and wanton infliction of pain" that implicates the Eighth Amendment, a prisoner cannot establish a constitutional violation merely by showing that he was injured at the hands of another. *Id*. at 834. Instead, he must show that prison officials were "deliberately indifferent" to his health and safety. *Id*.

To establish that a prison official was deliberately indifferent to his safety, a prisoner must prove that the official not only was aware of facts from which an inference could be drawn that

a substantial risk of serious harm existed, but also that the official drew that inference. *Id.* at 837. Stated differently, "the inquiry is not whether individual officers *should have* known about risks to [the inmate's] safety, but rather whether they *did* know of such risks." *Grieveson v. Anderson*, 538 F.3d 763, 775 (7th Cir. 2008) (emphasis in original) (citing *Farmer*, 511 U.S. at 842-43). In addition, a prison official who actually knew of a substantial risk to inmate health or safety but took reasonable steps to avert it does not violate the Eighth Amendment, even if the harm ultimately was not averted. *Farmer*, 511 U.S. at 844.

To be entitled to a trial on his failure-to-protect claim, then, Olson must adduce evidence from which a reasonable juror could answer "yes" to these three questions: 1) Did Olson face a substantial risk of harm from Russell? 2) Did Morgan or Schneider know that Olson faced this risk? 3) If so, did Morgan or Schneider personally disregard this risk? *Grieveson*, 538 F.3d at 775.

Olson's primary theory of his case is that Schneider and Morgan had to have appreciated the risk that Russell posed to Olson because Olson specifically *told* them that Russell had tried twice to hit him and that he was afraid Russell would try again. Defendants Schneider and Morgan have addressed this theory in their summary judgment submissions and have submitted affidavits denying that either of them was aware that there were any problems between Olson and Russell that would have alerted them of any danger to Olson or that they failed to take reasonable steps in response to what they did know about the two inmates.

In his brief and his responses to defendants' proposed findings of fact, however, Olson suggests that Morgan and Schneider knew other facts about Russell that not only corroborated his report but that should have alerted them that *anyone* sharing a cell with Russell was at risk, namely, that Russell had a violent prison history as well as a history of refusing "psychotropic" medications. *See* Plt.'s Br., dkt. 72, at 4; Plt.'s Response to DPFOF, dkt. 73, #9. If what Olson is saying is true, then he stands a much better chance at showing that defendants violated the Eighth Amendment: allowing an inmate to share a cell with someone known to have a habit of

attacking his cellmates or failing to take medication that prevents him from doing so could easily be seen by a jury as deliberate indifference. Unfortunately for Olson, he lacks admissible evidence to back up his claim. Olson says he knows about Russell's history because Russell told him about it while they were cellmates. Although there is no basis to dispute Olson's assertion that he and Russell discussed Russell's history, under the Federal Rules of Evidence Olson's recollection of what Russell told him is not admissible to prove either (a) that what Russell told him is true or (b) that Morgan or Schneider knew the same information. *See* Fed. R. Ev. 801, 802.

On the other hand, what other evidence could Olson possibly submit? When he asked defendants to provide summaries of Russell's "Mental Health Psychological, and Disciplinary records," they responded that they could not disclose Russell's confidential medical records unless Russell signed a release, which Russell has refused to do. Defendants offered no response to Olson's request for Russell's disciplinary records. Perhaps Olson could and should have been more tenacious, such as by crafting a more carefully-worded discovery request or asking defendants to submit the records *in camera*. (Although Olson filed a motion to compel, he did not focus on Russell's medical and disciplinary records.) Olson, however, is not a lawyer or skilled in the law. Indeed, he has asked this court three times if it would appoint counsel for him, but his requests have been denied, partly on the ground that he appeared to be capable of conducting discovery on his own. Dkts. 24, 46, 67. It would pervert justice to tell Olson that he is good enough at conducting discovery that he does not need a lawyer, only to dismiss his case later on the ground that he was not good enough to have figured a way around defendants' objection to his request for Russell's medical and disciplinary records.

Olson's submissions sufficiently raise pertinent questions about Russell's prison record and psychological history that suggest that defendants may have had additional knowledge about Russell beyond what appears in the record. Therefore, I am staying my ruling on defendants' summary judgment motion with respect to Olson's failure-to-protect claim to allow expansion of

the record and supplemental briefing. Specifically, not later than July 9, 2012, defendants Morgan and Schneider should submit additional proposed findings of fact stating what, if anything, they knew about Russell's disciplinary record and the reason(s) Russell had been placed in segregation at the time he was celled with Olson in 2011. Further, to the extent that defendant Morgan participated in the decision whether or not to classify Russell as a "single cell" inmate, he should explain why Russell was deemed eligible to share a cell and submit any foundational documents that were used to make that determination. If any such documents contain Russell's protected health information, then the state must submit them *ex parte* under seal for *in camera* review by the court. Defendants should also submit a supplemental brief addressing their additional evidence in the context of Olson's failure-to-protect claim. Once the court receives defendants' additional submissions, it will decide what kind of response is needed from Olson. (If we need a trial and if the parties need additional time to prepare, then the court will move back the August 13, 2012 trial date. But we aren't at that juncture yet).

**III. Failure to Provide Adequate Medical Care Claim Against Tenebruso**

To prove his Eighth Amendment claim against Tenebruso, Olson must show that he had an "objectively serious medical need," and that Tenebruso was "deliberately indifferent to it." *Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir. 2001). A medical need may be serious if it is life-threatening, if it carries a risk of permanent serious impairment if it is left untreated or if it results in needless pain and suffering when it is not treated, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer*, 511 U.S. at 837. "Deliberate indifference" means that Tenebruso was aware that Olson needed medical treatment, but disregarded the risk by failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

Olson has failed to make either showing. First, although Olson asserts in his brief that his "serious medical issues" consisted of "broken teeth or tooth, extreme pain, inability to eat, inability to sleep, and oral bleeding–over the course of more than 21 days," Br. in Opp., dkt. 72, at 2, he has not submitted any evidence to support this assertion. Statements in a brief are not evidence. Further, although he has submitted records from his medical file, nothing in those records document his allegations; in fact, none of the medical notes that Olson has submitted appear to even relate to any injuries sustained in the March 28 incident. There is simply no admissible evidence to support Olson's claim that he had a serious medical need, much less that Tenebruso knew about it before April 14, 2011.

Second, even assuming, *arguendo*, that Olson's damaged tooth actually constituted a serious medical need, there is no evidence in the record from which a jury could conclude that Tenebruso turned a blind eye to it. Olson contends that Tenebruso violated the Eighth Amendment by failing to refer him to a dentist until April 16, 2011, which was nearly three weeks after he was "triaged" by the nurse who allegedly told him his tooth should be pulled. However, there is no evidence that Nurse Ketarkus informed Tenebruso that Olson needed to be seen by a dentist or that Tenebruso had any independent knowledge of this. On this record, the only conclusion that can be drawn is that the first time Tenebruso became aware that Olson was having any medical issues related to the March 28 incident was on April 13, 2011, when she received and responded to his April 8 letter. Although Tenebruso did not refer him to a dentist at that time, Olson did not ask for such a referral or make clear that he was having problems with his tooth: the point of his letter was to ask why he had not been provided with aspirin by the nurse who treated him after his fight with Russell.

On this record, the facts show that the first time Tenebruso became aware that Olson was having problems with his tooth was on April 14, 2011, when she received several information requests from him. Tenebruso informed Olson that if he submitted a health services request and

asked to be seen by a dentist, she would schedule him to be seen. Although Olson did not submit the request as directed but instead responded by submitting an argumentative information request form, Tenebruso interpreted his response as a request to be seen by a dentist and placed a referral for dental services on April 16.

A prison official may be found deliberately indifferent if she fails to promptly treat a "severely painful but readily treatable condition" of which she is aware, even if the delay is only a few days. *Gomez v. Randle*, – F.3d —, 2012 WL 1660975, *4 (7th Cir. May 14, 2012) (quoting *Smith v. Knox Cnty. Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012)). In this case, however, the evidence does not permit a reasonable fact finder to draw that inference. Tenebruso arranged for Olson to see a dentist within two days of receiving correspondence from Olson that first made clear that he was having tooth problems; Olson was seen by a dentist three days later. Nothing in Olson's correspondence suggested that his need for dental care was emergent or that a faster response was necessary. Further, Olson has not presented any evidence that the brief delay contributed to his injuries. *Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir. 1996) (prisoner who complains that delay in medical treatment rose to the level of a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment in order to succeed). In short, there is no evidentiary basis upon which a jury could find that Tenebruso acted with "a sufficiently culpable state of mind" to support a finding that she was deliberately indifferent to Olson's dental condition.

**IV. Retaliation Claim Against Schneider**

To prove his claim against Schneider for retaliation under the First Amendment, Olson must adduce evidence from which a jury could find that: 1) he was engaged in a constitutionally protected activity; 2) he suffered a deprivation that would likely deter a person from engaging in the protected activity in the future; and 3) the protected activity was a motivating factor in

Schneider's decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)).

For the purpose of summary judgment, defendant Schneider has conceded that Olson has made the first two showings. He concedes that the filing of an inmate grievance has been recognized as a constitutionally-protected activity, *see, e.g., Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005), and that having a conduct report filed against him would likely deter a person from engaging in that protected activity in the future. Schneider contends, however, that Olson cannot show that his filing of a grievance was a motivating factor in Schneider's decision to issue a conduct report.

I agree. As Schneider points out, protected conduct "'cannot be proven to motivate retaliation[] if there is no evidence that the defendants knew of the protected [activity].'" *Stagman v. Ryan*, 176 F.3d 986, 1000-01 (7th Cir. 1999) (quoting *O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1369-70 (7th Cir. 1993)). Olson has not introduced any evidence to refute the ICE's testimony that she did not inform Schneider of Olson's grievances or Schneider's testimony that he did not know of the grievances when he issued the conduct report. Absent such evidence, Schneider is entitled to judgment on Olson's retaliation claim.

ORDER

IT IS ORDERED that:

1. Defendants' motion for summary judgment, dkt. 51, is GRANTED IN PART and STAYED IN PART, as follows:

A. The motion is GRANTED as to plaintiff's claims that defendant Tenebruso failed to provide him with adequate medical care and that defendant Schneider issued a retaliatory conduct report against him.

B. The motion is STAYED as to plaintiff's claim that defendants Schneider and Morgan failed to protect him from the March 28, 2011 attack by his cellmate, Thomas Russell.

2. Not later than July 9, 2012, defendants Morgan and Schneider should submit supplemental affidavits stating what, if anything, they knew about Russell's disciplinary record and the reason for his placement in segregation at the time he was celled with Olson on the DS-2 unit in 2011. Further, to the extent that defendant Morgan participated in the decision whether or not to classify Russell as a "single cell" inmate, he should explain why Russell was deemed eligible to share a cell and submit any foundational documents that were used to make that determination. To the extent that those documents contain Russell's protected health information, they may be submitted *ex parte* and under seal.

Defendants should also submit a supplemental brief addressing their additional evidence in the context of Olson's failure-to-protect claim.

Plaintiff should wait to hear from the court before filing a response to defendants' additional submissions.

Entered this 25th day of June, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge