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

DEREK M. WILLIAMS,

Plaintiff,

v.

RICK RAEMISCH, WILLIAM POLLARD, PETER ERICKSEN, WILLIAM SWIEKATOWSKI, THOMAS CAMPBELL, ROBIN LINDMEIER, PETER GAVIN, MICHAEL SCHULTZ and CHRISTOPHER STEVENS,

Defendants.

OPINION AND ORDER

11-cv-411-slc

This is a prisoner civil rights action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Derek M. Williams is proceeding on retaliation, due process and Eighth Amendment conditions-of-confinement claims against the security staff and the warden at the Green Bay Correctional Institution and the secretary of the Department of Corrections. Williams contends that after he filed lawsuits against some of these defendants in 2009, the defendants named in *this* suit commenced a "campaign of retaliation" against him in the form of trumped-up conduct reports, unfair disciplinary hearings and a 16-month placement in segregation, where the conditions were unduly harsh.

Defendants have moved for summary judgment, arguing that Williams lacks the evidence necessary to establish his claims. Defendants are correct. With respect to Williams's retaliation claims, although Williams presents some evidence suggesting that defendants Lindmeier and Swiekatowski harbored some retaliatory animus against him, he has failed to adduce evidence from which a jury could conclude that he would not have been disciplined but for that animus. Williams has no evidence of retaliatory animus or personal involvement with respect to the other defendants.

Defendants also are entitled to summary judgment on Williams's conditions-of-confinement claims, which fail either because Williams has not adduced evidence showing that the conditions were sufficiently serious to violate the Eighth Amendment's objective component or because he has not shown that any of the defendants named in this suit knew of the conditions yet failed to take action to correct them, knowing that doing so was exposing Williams to a substantial risk of serious harm.

Finally, Williams's due process claims are barred by the "random and unauthorized" doctrine.

UNDISPUTED FACTS

Unless otherwise noted, the following facts are undisputed and derive from the parties' submissions regarding defendants' proposed findings of fact. During summary judgment briefing, Williams submitted his response to defendants' proposed findings of fact, but he did not submit any of his own proposed findings of fact. Although this strategy is permitted by this court's *Procedure to be Followed on Motions for Summary Judgment*, *see Procedure*, Sec. II. B. (responding party "may" propose its own findings of fact), the *Procedure* instructs that:

> [w]hen a responding party disputes a proposed finding of fact, the response must be limited to those facts necessary to raise a dispute. The court will disregard any new facts that are not directly responsive to the proposed fact. If a responding party believes that more facts are necessary to tell its story, it should include them in its own proposed facts, as discussed in II.B.
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> *Id.*, II.D.4.

Also, the court's written procedure cautions that "[t]he court will not consider facts contained only in a brief." *Id.*, I.B.4. The reason for these rules is to ensure that the other side

has fair notice of the facts the non-movant deems significant and to permit it to respond to those facts, just as the non-movant is permitted to do in response to the movant's proposed findings.

Here, Williams appears to want the court to consider additional facts beyond those proposed in his response, insofar as many of the documents to which he cites in support of his responses address matters well beyond the fact cited by defendants. *See, e.g.*, Plt.'s Response to Def.'s Proposed Findings of Fact, ¶¶ 104-105, referring to dkt. 57, which is a "Report on Conditions of in the Green Bay Correctional Institution Segregation Unit in Green Bay, Wisconsin" that he wrote. Additionally, Williams's brief in opposition to defendant's motion for summary judgment refers to other evidence he deems pertinent, but which he did not include in a response to a proposed finding of fact.

The narrative of undisputed facts below does not include this evidence because it is not clear which part of these materials defendants may dispute, having been deprived of a fair opportunity to respond to proposed findings regarding much of this evidence. In accordance with the *Procedure*, I have included only those facts proposed by Williams that are directly responsive to a fact proposed by defendants and to which defendants have had an opportunity to respond. *See Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1010 n. 2 (7th Cir. 1997) (stating that federal courts are not obliged to scour the record looking for factual disputes).[1]

[1] In one of his previous lawsuits, Williams properly followed the court's procedure by submitting a response to defendants' proposed findings of fact and a separate set of his own proposed findings of case. *See* Case No. 09-cv-641-wmc, dkts. 40 & 41. In his other previous lawsuit, Williams's missed his extended deadline to submit an opposition, so the defendants' summary judgment motion was unopposed in the record. *See* Case No. 09-cv-485-wmc at dkt. 45.

That said, of the admissible evidence that Williams submitted, much is irrelevant or immaterial. I address the more significant pieces of evidence in the discussion below. To the extent I have not referred to certain evidence, I did not deem it relevant or material.[2]

I. The Parties

Derek Williams is an inmate of the Wisconsin Department of Corrections (DOC) who has been incarcerated at the Green Bay Correctional Institute (GBCI) at all times relevant to this action. He has been diagnosed as having a dysthymic disorder, cocaine dependence and antisocial personality disorder.

Defendant Peter Ericksen is employed by DOC as the Security Director at GBCI. Defendants William Swiekatowski, Thomas Campbell, Robin Lindmeier, Peter Gavin, and Christopher Stevens are lieutenants and defendant Michael Schultz is a captain at GBCI. Defendant William Pollard was the warden at GBCI at the times relevant to Williams's claims, but he is now the warden at the Waupun Correctional Institution. Defendant Rick Raemisch was the secretary of the DOC.

On October 23, 2009, and November 30, 2009, Williams was granted leave to proceed in this court on his civil rights lawsuits against defendants Pollard, Raemisch and Campbell. *See Williams v. Pollard, et al.*, 09-cv-641-wmc, and *Williams v. Pollard, et al.*, 09-cv-485-wmc.

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[2] In particular, Williams has filed a motion to strike portions of defendants' reply brief that refer to his alleged association with the Gangster Disciples. Dkt. 76. Because these facts are not material to the parties' dispute, I have not referred to them and Williams's motion to strike is DENIED as unnecessary. In the same motion, Williams asks for permission to correct certain typographical errors in his response to the proposed findings of fact. That request is GRANTED.

On February 5, 2010, Williams was selected randomly by GBCI staff to provide a urine sample to be tested for the use of illegal drugs. (Williams disputes that he was selected randomly, but he has no proof to the contrary.) The test results were negative. (Williams also claims that around this time, his cell was searched and he was strip searched, although he does not say precisely when this occurred and he has not presented admissible evidence showing who performed or ordered the searches.)

On March 11, 2010, Williams was placed on temporary lock up status under suspicion that he was bringing drugs into the institution.

II. Lindmeier and Swiekatowski's Alleged Remarks

Williams has submitted an affidavit from another inmate, Sabir Wilcher, who avers that on March 15, 2010, Lindmeier said to Wilcher, "Derek Williams ever mention his lawsuit to you?" According to Wilcher, after he said, "no," Lindmeier said, "It was a big mistake."

Williams also avers that on March 16, 2010, he asked Swiekatowski why he was in the "hole" (*i.e.* temporary lock-up), to which Swiekatowski replied, "When you challenge the administration bad things happen."

Lindmeier and Swiekatowski deny making these statements.

III. Williams is Charged with Conduct Violations

A. Conduct Report 2180862

On March 24, 2010, while Williams was still under investigation for drug violations, defendant Swiekatowski issued Conduct Report No. 2180862 for a violation of Wis. Admin.

Code DOC § 303.32 (Enterprise and Fraud). The charges were based on an envelope containing two letters that Swiekatowski received from the mail room that had been returned by the post office as not deliverable. The envelope for the letter had been postmarked February 11, 2010 and postmarked "Return to Sender" on February 13, 2010.

The envelope was addressed to Renee Pendzimas and bore Williams's return address. One of the letters was addressed to "Renee" and signed by Williams. The other letter was unsigned and contained no addressee. In the conduct report, Swiekatowski wrote:

> In this letter Williams writes, to set up Myspace and Facebook accounts to sell clothing, and for everything that we sell off of this marketing technique, we will split everything 50/50.
>
> By engaging in this business transaction inmate Williams is guilty of 303.32 as he is trying to sell items as part of a business.

Although it appears Williams may have initially waived a due process hearing, he later requested a hearing on the charge and the assistance of a staff advocate. A hearing was held before defendant Campbell on March 30, 2010. Williams was given an opportunity to call witnesses but did not call any. Williams submitted a written statement, in which he admitted that he mailed the first letter to Pendzimas, but denied that the second letter was his, arguing that the typewriter font style and handwriting on the second letter was different from his own. Campbell found Williams guilty of the violation, explaining that, regardless who had written the second letter, it had been found enclosed with materials that Williams admitted that he sent, and therefore it was more likely than not that he had possessed the letter and had mailed it to Pendzimas for the purpose of engaging in business activity. Campbell sentenced him to 90 days disciplinary segregation for the violation.

Williams appealed the finding to Pollard, who affirmed the decision. Williams also filed a grievance concerning the conduct report and disciplinary hearing, which was dismissed by defendant Pollard. The dismissal of the grievance was upheld by Raemisch.

B. Conduct Report No. 2180886

On May 21, 2010, Williams was served with Conduct Report No. 2180886 for conspiracy to possess intoxicants (drugs). The report was signed by defendant Lindmeier, but defendant Swiekatowski helped Lindmeier write it because Swiekatowski was more experienced in drug investigations.

According to the conduct report, Lindmeier had received the following evidence:

> -a statement from Confidential Informant #1, known to be reliable in the past, who said Williams had offered to sell him marijuana or cocaine; that Williams told him that interested buyers could send money to a P.O. Box used by Williams's girlfriend, Karen Banek, who would use the money to buy the drugs which she would subsequently smuggle into the prison during contact visits; and that an inmate named Sabir Wilcher held the drugs and sold them in the north cell hall on Williams's behalf;
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> -an independently-obtained statement from Confidential Informant #2, also known to have been reliable in the past, who also said Williams was selling drugs through his runner, Wilcher, and that he obtained the drugs through visits with Banek; CI #2 also said Williams went by the nickname "lil Dee;"
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> -a letter written by an inmate, Robert Smith, an inmate housed near Williams at the time, to Banek, that plainly appeared to be written on Williams's behalf, in which Smith writes, "Derek was not mad you did not do those orders;" "Sabir" and another person nicknamed "J" in Portage were "the only ones that can call;" if someone else calls they will say "Calling for Dee" and no

> one else should be calling; and "[a]ll previous orders or business for anyone is on hold til Derek talks to you and things are cleared up;"
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> -monitored phone calls between Banek and several inmates, including from Williams and another inmate named James Sibila, where the caller indicated that money was coming her way or inquired whether she had received certain sums of money, but who never mentioned what the money was for;
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> -a monitored phone call on March 7, 2010 from Wilcher to Banek, informing her that "J" (Sibila) had gone to segregation "so everything related to him is on hold;" and
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> -knowledge that Sibila had gone to segregation for possession of marijuana and drug paraphernalia.

Lindmeier concluded from this evidence that it was more likely than not that Williams had conspired with others to bring drugs into the institution.

On June 8, 2010, a disciplinary hearing was held on this conduct report in front of defendant Gavin. Williams appeared in person and had a staff advocate present. In addition to considering Williams's written statement, Gavin heard testimony from Lindmeier and considered the confidential witness statements, the letter from Smith to Banek and the phone recordings. Williams was allowed to question Lindmeier and call two witnesses, Sibila and Wilcher. Gavin denied his request to call Banek and the confidential informants as witnesses.[3]

[3] After this lawsuit commenced, Williams sought redacted copies of the confidential informants' statements and for copies of the telephone recordings. Defendants responded that they could not locate the informants' statements, stating their belief that they had been sent to this court for another lawsuit and not returned. In any event, they said, they would not produce the statements for security reasons. With respect to the phone recordings, defendants asserted that one tape had been damaged beyond repair during the process of transferring it to a CD, but that the other tapes were available for Williams to listen to if he made proper arrangements with the Institution Complaint Examiner. Williams has filed a motion to compel defendants to produce this evidence for use at trial. Dkt. 82. Because there will be no trial, that motion is moot.

Gavin found Williams guilty of the charge and imposed a sentence of 360 days in disciplinary segregation. Williams appealed the decision to Pollard, who affirmed Gavin's decision. Williams also filed a grievance concerning this conduct report, which was dismissed by Pollard. Defendant Raemisch affirmed the dismissal.

C. Conduct Report No. 2154007

On August 19, 2010, defendant Stevens issued Conduct Report No. 2154007 to Williams for a violation of Wis. Admin. Code DOC § 303.27(1) (Lying About Staff). The charges were based on a copy of a letter that Williams sent to Raemisch, in which he stated, among other things, that

> [t]his institution and the staff as a whole . . . . have deprived me of the I.C.R.S., prevented my access to the courts, allowed illegal acts to go unreported, aided and abetted in DOC Work Rule Violations, and most of all turned a blind eye to an assault that has been hidden and kept within the DOC's 'code of silence.'

In the conduct report, Stevens wrote that "The DOC does not have a code of silence," that all of Williams's allegations were false and unsupported, and that by making them, Williams was negatively affecting the integrity of staff at GBCI.

On November 11, 2010, Williams had a full due process hearing conducted by defendant Schultz. Williams was permitted to call the Institution Complaint Examiner and the staff member responsible for forwarding complaints to the mail room and to obtain a statement from Stevens. Williams provided a written statement in which he admitted that he had written the letter but said he did not realize that he was breaking any rules. Schultz found him guilty and imposed punishment of 180 days disciplinary segregation. Williams appealed the decision and

it was affirmed by Pollard. Williams also filed a grievance, which was dismissed by Pollard. Pollard's decision was upheld by Raemisch.

III. Conditions of Confinement in GBCI's Segregation Unit

As a result of his string of conduct violations, Williams was housed in GBCI's segregation unit from March 14, 2010 to June 2011. (During this time frame, he spent some periods in observation related to acts and threats of self-harm.)

A. Noise

Generally, inmates who are housed in segregation are those who have shown a blatant disregard for authority or the rules of the prison, and whose behavior is not deterred by the issuance of a conduct report. Because the segregation unit houses the most disruptive and difficult-to-control inmates, it is often noisy. Inmates typically make noise by shouting or by banging on the metal door in their cells. According to Williams, the noise can sometimes go on for 10-12 hours in a row, interfering with sleep. Williams was prescribed a sleep medication while in segregation.

B. Constant Illumination

For security reasons and the welfare of inmates, staff at GBCI must check on inmates at unpredictable intervals at least once every half hour several times each night. Staff must make certain that the inmates are actually present in their cells, not engaged in making weapons or attempting to escape, not engaged in any suicide or other self-harm activities, not damaging their

cells, and not in need of emergency medical or mental health care. For safety reasons, staff perform this monitoring activity by observing inmates through a window in the cell door.

To make this nighttime monitoring activity possible, each cell is equipped with a five-watt, twin tube florescent light within a fixture mounted in the center of the wall where the ceiling meets the wall. The light is equipped with an acrylic prismatic lens, which is supposed to disburse the light and minimize glare from the bulb. This nightlight comes on automatically when the inmate shuts off the general illumination light switch located in his cell and cannot be turned off by the inmate.

C. Recreation

GBCI has 12 recreation cells for inmates on segregation. These cells vary in size from 8' x 8' feet to 8' x 10'. The cells are for single-person use and are walled off from one another, with openings high up that are covered with wire and allow in natural light and air. Inmates in segregation are offered a weekly maximum of two 2-hour recreation periods, time and weather permitting. During the winter months, recreation often is not offered because of the weather. Recreation is offered only before 6 a.m. and the inmate must be standing at his cell door when staff come through. However, inmates are allowed and encouraged to exercise in their cells.

D. Indirect Exposure to Chemical Agents

GBCI uses chemical agents when needed to subdue recalcitrant inmates. It uses a blend of Oleoresin Capsicum ("OC"), a.k.a. pepper spray, and Orthochlorobenzalmalononitrile ("CS")

(military tear gas).[4] How often such chemical agents are used on inmates in GBCI's segregation wing varies from day to day and week to week. Depending on the type of delivery system used, it is possible that an inmate housed in a cell or two on either side of the targeted cell will have some indirect exposure, which may irritate exposed skin. In cases where it is possible that an inmate received a significant indirect exposure, segregation staff would allow the inmate to shower and issue clean clothes and linens.

Williams estimates that he was indirectly exposed and "directly affected" by chemical agents 71 times during his stay in segregation. He was allowed to shower only one of those times.

E. Cell Temperature

GBCI's heating and ventilation system is maintained regularly by GBCI's maintenance staff. The official responsible for monitoring the air temperatures in the prison is Scott Stennepoorte, Maintenance Superintendent of Building and Grounds. During the winter, staff sets the thermostat that controls the heating system on the unit at approximately 74 degrees. However, there are no thermostats in the cells and prison staff do not take readings of the temperatures in the individual cells.

Williams alleges that the segregation unit cells, particularly on the end of the unit, are uncomfortably cold during the winter months. He and other inmates in segregation have filed

[4] Although defendant asserts that Williams has no foundation to support his claim that GBCI uses military tear gas on inmates, this information was provided by counsel for defendants in a response to a request for production of documents dated April 18, 2012. Dkt. 65, exh. 17, ¶58.

complaints about the cell temperatures. On December 5, 2010, Williams wrote a letter to defendant Raemisch complaining that cells in the segregation unit were extremely cold and the prison-issued clothing did not provide adequate warmth. On January 13, 2011, he made the same claim in an offender complaint that he filed pursuant to the prison's grievance system. On January 14, 2011, the Institution Complaint Examiner, Cathy Francois, responded to the complaint, reporting that a maintenance person had conducted a temperature reading of the wing on which plaintiff was housed and found the temperature to be 74 degrees and that there had been no reported problems with the heating system on the housing units. Francois recommended that plaintiff's complaint be dismissed. Defendant Pollard accepted that recommendation and dismissed the complaint on January 14, 2011.

On January 16, 2011, Williams wrote to Pollard, stating that the ventilation system was blowing cold air in his cell. Pollard did not respond to the letter.

During the winter of 2010-2011, there were no major repairs done on the heating system.

F. Williams's Treatment for Mental Health Issues While In Segregation

On August 16, 2010, Williams was seen by Dr. McQueeney, a prison psychiatrist, on a referral from Dr. Breen. McQueeney found that Williams was predominantly antisocial with no symptoms of mental illness. Although Williams reported having suicidal thoughts, he provided no details. McQueeney found nothing to indicated the need for psychotropic medications.

On January 6, 2011, Williams was seen in the Health Services Unit at his request for complaints of headaches and loss of appetite. Williams reported having some blurry vision and

a pounding sensation in his head, reporting that these headaches started in October 2010. Williams said his headaches typically occurred around noon or in the early evening and could last 6-8 hours. After a complete nursing evaluation, staff advised him to alternate Tylenol with ibuprofen and to request an eye exam. An eye exam was ordered the next day and blood and urine specimens were obtained for lab testing. Williams was scheduled to see a doctor after the eye exam and lab results were back.

On January 31, 2011, Williams was seen in the HSU after he had been observed cutting himself in his cell. After his wounds were treated by nursing staff, he was placed in restraints and observation for his safety. Williams refused to explain why he had cut himself, saying only that he wanted to die.

On February 1, 2011 and February 7, 2011, Williams was seen in the HSU and placed in restraints for incidents of self-cutting. Again, Williams refused to talk other than to say that he wanted to kill himself.

On March 3, 2011, Williams had an eye exam, at which he was prescribed new glasses. He had no more complaints about his vision after that.

On March 11, 2011, Dr. Heidorn ordered a one-year prescription of Excedrin for Williams's migraine headaches.

On April 18, 2011, Williams was placed in 5-point restraints because he was threatening to jump off the sink.

On April 28, 2011, Williams had a psychiatric evaluation. He reported his belief that he was being mistreated by security staff for an incident that happened while he was at another institution, where he had become involved with his psychologist who later killed herself.

Williams indicated that he was suicidal and could not deal with the noise of segregation and that he kept hearing his former psychologist's voice.

On May 7, 2011, Williams was prescribed fluoxetine (the generic form of Prozac) for depressive symptoms of suicidality and trazodone (another generic antidepressant) for reported issues with insomnia. At a follow-up visit with the psychiatrist on May 28, 2011, Williams reported that the medication had helped somewhat although he still felt depressed. He was eating well and sleeping at night. At his request, the psychiatrist increased the dosage of his medications.

At a follow-up on June 25, Williams reported that he was doing well on his medication, although he was still not at his baseline. He asked for a slight increase in his medications to help with residual symptoms of depression.

OPINION

I. Summary Judgment Standard

Summary judgment is appropriate on a claim when 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) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

II. Retaliation–Conduct Reports

Prison officials may not retaliate against an inmate for his exercise of a constitutionally-protected right. *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000).

> To prevail on a First Amendment retaliation claim, [plaintiff] must ultimately show that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was 'at least a motivating factor' in [defendant's] decision to take the retaliatory action.
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> *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009).

See also Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005). If a plaintiff shows that his protected activity was a motivating factor in the defendant's retaliatory action, then defendants still may prevail if they can establish that they would have taken the same action even if plaintiff had not engaged in the protected conduct. *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 287 (1977); *Spiegla v. Hull*, 371 F.3d 928, 943 (7th Cir. 2004).

Williams contends that after he filed his lawsuits against Pollard, Raemisch and Campbell, the various defendants engaged in a "campaign of retaliation" against him, which

began with relatively minor actions such as subjecting him to a urinalysis test and a strip search, but escalated into the filing of three "trumped up" conduct reports against him that had the effect of keeping him in the segregation unit for a period of 16 months.

Defendants respond by acknowledging that Williams's filing of two lawsuits constitutes protected activity and that the filing of conduct reports and resulting placement in segregation are actions sufficiently adverse as to be likely to deter First Amendment activity in the future. They contend, however, there is no causal connection between the two. Rather, it was Williams's own behavior and not any retaliatory motive on the part of defendants that led to the conduct reports and his resulting placement in segregation. In other words, defendants assert that Williams would have received conduct reports even if he had not filed lawsuits against Pollard, Raemisch and Campbell in 2009.

As an initial matter, I note that although Williams suggests that the defendants "conspired" to retaliate against him, he has adduced no evidence of an explicit or implied agreement, which is an essential requirement of a conspiracy claim. *Williams v. Seniif*, 342 F.3d 774 (7th Cir. 2003). (The mere fact that before Williams filed his lawsuits, his disciplinary record at GBCI consisted of only minor violations is not evidence of a conspiracy.) Accordingly, to survive summary judgment, Williams must adduce evidence that would allow the inference that individual defendants were motivated by retaliation to take adverse action against him, and further, that the adverse action would not have occurred but for each defendant's retaliatory motive. Against this backdrop, I analyze the evidence of retaliation relating to each defendant:

A. Defendant Swiekatowski

Williams contends that Swiekatowski issued Conduct Report 218062, charging him with enterprise/fraud, in retaliation for Williams's having filed lawsuits against Pollard, Raemisch and Campbell. As proof that Swiekatowski did so in retaliation for his protected activity, Williams swears that on March 16, 2010, just eight days before filing the conduct report, Swiekatowski said to him, "When you challenge the administration, bad things happen."

Although Swiekatowski's alleged statement is vague and made several months after Williams filed his lawsuits, when viewed in the light most favorable to Williams it provides circumstantial evidence of a retaliatory motive. *See Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 792 (7th Cir. 2007) (citing *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)) (circumstantial evidence of retaliation includes "suspicious timing, ambiguous statements, behavior toward or comments directed at other [persons] in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn"). Although fact finders could disagree, it would be reasonable to infer that Swiekatowski's remark about Williams "challeng[ing] the administration" was a reference to his lawsuits, and that his statement that "bad things happen" was a disparaging remark that indicated that Swiekatowski was bothered by those lawsuits. Further, shortly after making this comment, Swiekatowski took adverse action against Williams in the form of a disciplinary report. The arguably disparaging comments made about Williams's protected conduct followed shortly by adverse treatment is sufficient evidence to support an inference of retaliatory motive. *Magyar v. Saint Joseph Regional Medical Center*, 544 F.3d 766, 773 (7th Cir. 2008) (concluding that summary judgment was inappropriate on retaliation claim because of evidence that defendant was bothered by defendant's protected

conduct); *Jackson v. Raemisch*, 726 F. Supp. 2d 991, 1007 (W.D. Wis. 2010) (evidence indicating that a few weeks before filing conduct report against plaintiff, officer was directed by supervisor to write up plaintiff for conduct violations if he made "the slightest mistake" because he had been "harassing staff with inmate complaints" enough to defeat summary judgment in favor of officer who filed conduct report) (Conley, J.).

Once a plaintiff has made out a prima facie case of retaliation by a defendant, the burden shifts to the defendant to demonstrate that defendant's animus was not a necessary condition of harm of which plaintiff complains, *i.e.* that the same outcome would have resulted for plaintiff even without defendant's retaliation. *Greene v. Doruff*, 660 F.3d 975, 980 (7th Cir. 2011)(parsing the difference between a "sufficient condition" and a "necessary condition"); *Zellner v. Herrick*, 639 F.3d 371, 379 (7th Cir. 2011). In other words, even where the evidence supports an inference of animus it is still possible for a defendant to obtain summary judgment. If defendant meets this burden, plaintiff "must then demonstrate that the defendant's proffered reasons for the decision were pretextual and that retaliatory animus was the real reason for the decision." *Zellner*, 639 F.3d at 379. "At the summary judgment stage, this means that a plaintiff must produce evidence upon which a rational finder of fact could infer that the defendant's proffered reason is a lie." *Id.*, citing *Vukadinovich v. Board of School Trustees*, 278 F.3d 693, 699 (7th Cir. 2002).

Here, Swiekatowski asserts that even in the absence of Williams's protected conduct, he would have filed the conduct report for enterprise/fraud based on the letter containing the references to the MySpace and Facebook accounts, which indicated that it was more likely than not that Williams had committed the charged offense. Williams responds that Swiekatowski's

explanation is not believable because it has no basis in fact. Williams swears that, contrary to the allegation in the conduct report, he did not write the letter. In addition to his own denial, Williams has submitted an affidavit from an inmate named Ricky Scott, who avers that *he* wrote the letter (but denies that he intended for it to be sent to anyone).

As Swiekatowski points out, however, the determination who *wrote* the letter was and is immaterial to the disciplinary charge: what mattered was who *sent* it. According to Swiekatowski, that Williams was the sender is shown by the fact that the letter was included in an envelope with a letter that Williams admits he wrote and sent to someone outside the prison. Indeed, Scott's testimony, indicating that he had written the letter "as a 'sample proposal' in answer to a previous discussion [he] had with Williams," dkt. 63, exh. 11, at 91, leaves open the possibility that Scott gave the letter to Williams, who in turn could have mailed it.

Williams, however, swears that he never *mailed* the letter. He swears that the only thing that he mailed to Pendzimas in the envelope postmarked February 11, 2010 was the other letter that he admits he wrote, which said nothing about any business or enterprise. As for how Scott's letter got into his envelope, Williams says a reasonable jury could infer that it was planted there by Swiekatowski, who set him up in retaliation for his previously-filed lawsuits.

At the motion to dismiss stage, a plaintiff need only allege a plausible set of facts in support of his legal theory. At summary judgment, however, he must do more: he must come forth with *evidence* which, if believed, could support a reasonable inference that the defendant retaliated against him. Williams cannot meet that burden. Even if a reasonable jury believed Williams's testimony that he did not mail the letter, there are no facts that would allow the jury to take the next step and find that Swiekatowski planted the letter in the envelope addressed to

Pendzimas. Notably, Williams offers no evidence showing how or when Swiekatowski might have obtained the letter from either Scott or Williams. As noted earlier, neither Scott nor Williams tells us what happened to the letter between the time Scott penned it and the time it mysteriously appeared in the same envelope with Williams's letter to Pendzimas. Did Scott keep it or had he given it to Williams? Did one of them throw it in the trash, whence it was surreptitiously retrieved and misused by Swiekatowski? Were either of their cells searched between the time Scott wrote the letter and the time it resurfaced in the Pendzimas envelope? Was Swiekatowski one of the people who searched the cell, which gave him the opportunity to pilfer the letter in order to set up Williams to take a fall? Without evidence that offers plausible answers to these sorts of questions, Williams's theory is merely unsupported conjecture. At trial, this evidentiary vacuum would require a jury to speculate as to how the Scott letter got into Williams's envelope if Williams didn't put it there. When the evidence from the non-moving party provides for only speculation or guessing, summary judgment is appropriate. *Davis v. Carter*, 452 F.3d 686, 697 (7th Cir. 2006).

In sum, Williams has not adduced evidence from which a jury could find that Swiekatowski is lying about the reason he issued conduct report 218062. Because the undisputed evidence shows that Swiekatowski issued the report because he believed Williams more likely than not had violated the prison rule against enterprise and fraud, Williams cannot show that retaliation was the but-for cause of his discipline. Accordingly, his claim against Swiekatowski fails.

Williams also alleges that Swiekatowski retaliated against him by writing and typing up Conduct Report No. 2180886, which was signed by defendant Lindmeier. I will address this in the context of Williams's claim against Lindmeier.

B. Lindmeier

Williams contends that defendant Lindmeier retaliated against him because of his protected conduct when she filed Conduct Report 2180886, which charged him with violating Wis. Admin. Code DOC § 303.43©. As evidence of retaliatory motive, he points to Lindmeier's alleged statement to Wilcher, wherein she said that Williams's lawsuit had been "a mistake." Although Lindmeier argues this statement is too vague to support an inference of retaliation, I disagree. Viewed in the light most favorable to Williams, reasonable fact finders could find that this statement, like Swiekatowski's, shows that Lindmeier was aware of Williams's protected conduct and she was not happy about it, which allows the inference of a retaliatory motive.

Nonetheless, Lindmeier has presented evidence to show that Williams would have been disciplined regardless of any retaliatory motive. Lindmeier avers that she issued Conduct Report 2180886 not because of any retaliatory motive, but because she had received information and conducted inmate interviews which led her to conclude that Williams was participating in the transfer of money for the purchase and delivery of drugs. That information, detailed above, combined with Lindmeier's affidavit, suffices to meet her burden of rebutting the causal inference.[5]

[5] The fact that some of the evidence corroborating Lindmeier's accusations has gone missing (n. 3, *supra*) is troubling but this does not militate a different conclusion. I discuss this more below.

Williams, then, must produce evidence showing that Lindmeier's stated reason for filing the conduct report against him is a lie. He cannot meet this burden. Most of his arguments amount to debating whether the various pieces of evidence cited in Lindmeier's report were sufficient to support her conclusion, *see* Plt.'s Br. in Opp. to Mot. for S.J., dkt. 61, at 6. Such arguments are insufficient to defeat summary judgment. Williams must show that Lindmeier did not *honestly believe* that he had violated the prison rules. As detailed above, Lindmeier had evidence from multiple sources that corroborated each other. None of the various discrepancies and other pieces of evidence related to the drug charge to which Williams points exonerates him or calls into serious doubt the reasonableness of Lindmeier's belief that Williams had more likely than not conspired to bring drugs into the institution.

Williams suggests that Lindmeier should not be believed because, contrary to what is written in the conduct report, she revealed during discovery that Swiekatowski wrote the report and that she did not listen to the phone recordings but reviewed summaries prepared by other staff. These things do not lead to the inference that Lindmeier is lying about everything. That Swiekatowski may have helped draft and type the report drafting does not impeach or refute Lindmeier's testimony that she was the officer who performed the investigation and issued the conduct violation. As to the apparent misstatement about the phone recordings, it is undisputed that Swiekatowski helped write and type up the report, which could easily explain the discrepancy. Further, Williams has no evidence to refute Lindmeier's assertion that she reviewed the summaries of the phone recordings before she filed her report. A prison official need not adhere rigidly to procedural guidelines or file a flawless conduct report in order to avoid an inference of retaliation; instead, pretext exists in the form of "a dishonest explanation, a lie rather

than an oddity or an error." *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 685 (7th Cir. 2000). Here, whether Lindmeier actually listened to the recordings as opposed to read a summary of them is not material to her decision to issue the conduct report, particularly where Williams has not suggested that the conduct report does not accurately reflect what was said on the recordings.[6]

Finally, Williams argues that the confidential informants' statements were fabricated. He makes this contention based on the fact that defendants reported during discovery that they cannot locate the statements. In other words, he argues that the fact that the statements are missing warrants an inference that the statements never existed and that Lindmeier lied in her report.

Williams asks that too much be inferred from defendants' sloppy record keeping. Lindmeier has sworn that she interviewed the confidential informants and received information from them. Williams does not dispute that he received summaries of their statements. The fact that the original statements from which the summaries were created are missing does not show that the summaries are inaccurate or that Lindmeier never obtained statements from the informants. Further, Williams has no evidence that the statements were lost in bad faith. *See Everett v. Cook County*, 65 F.3d 721, 727 (7th Cir. 2011) (for factfinder to make inferential leap that missing documents would have contained information harmful to defendant, plaintiff must show that documents were intentionally destroyed in bad faith). Finally, there is no dispute that Williams was provided with a copy of the Smith letter and was offered the opportunity to listen,

[6] Williams does, however, dispute the *meaning* of what was said during the phone conversations.

with one exception, to the phone recordings that Lindmeier relied on in her report. This still-extant evidence provides independent corroboration for what Lindmeier says the informants told her and supports the disciplinary charge that she issued against Williams.

Finally, I note that in his brief, Williams points to two other inmates who say they were accused of smuggling drugs into the institution but who received no discipline for that conduct. Williams did not present these alleged facts in any proposed finding of fact, so, as discussed above, I cannot consider them. Even if I were to consider this evidence, it would not change the outcome because there is no evidence that Lindmeier was the decisionmaker with respect to the incidents relating to the other inmates. *See, e.g., Coleman v. Donahoe*, 667 F.3d 835, 848 (7th Cir. 2012) (plaintiff proceeding under indirect method of showing unlawful discrimination must show that comparators are similarly situated in all material respects, including that they were disciplined, or not, by same decisionmaker); *Ellis v. United Parcel Service, Inc.*, 523 F.3d 823, 826 (7th Cir. 2008) (to be similarly situated, proposed comparator must have been treated more favorably by same decisionmaker that disciplined plaintiff).

I return briefly to Lt. Swiekatowski. Williams contends that Swiekatowski retaliated against him by helping Lindmeier write the conduct report, knowing that the information in the report was "trumped up and false." As just discussed, however, Williams has failed to adduce evidence from which a jury could show that the evidence was "trumped up." He would have received the conduct report no matter what. This claim against Lindmeier and Swiekatowski fails.

C. Stevens

Williams contends that defendant Stevens retaliated against him by filing Conduct Report No. 2154007, which charged him with violating Wis. Admin. Code DOC § 303.27(1) (Lying About Staff), based on the letter Williams sent to Raemisch in August 2010. Williams denies that his letter contained lies, and says Stevens had no basis to say otherwise because he never conducted an investigation. Williams alleged in his complaint that Stevens filed the "trumped up" conduct report as part of the "campaign of retaliation" against him for filing lawsuits against Pollard, Raemisch and Campbell.[7]

Even if the conduct report were to have been "trumped up," as Williams contends, falsifying a disciplinary charge does not give rise to a claim under § 1983 unless the motive for the fabrication was to retaliate for the exercise of a constitutional right. *Lagerstrom v. Kingston*, 463 F.3d 621, 625 (7th Cir. 2006); *Black v. Lane*, 22 F.3d 1395,1402 (7th Cir. 1994). Williams has produced no evidence of suspicious timing, ambiguous statements or anything else from which a jury could infer retaliatory motive. Indeed, Williams has not even shown that Stevens knew about his lawsuits. *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 668 (7th Cir. 2006) (defendant who is unaware of plaintiff's protected activity cannot be liable for retaliation). Because there is no evidence suggesting a causal connection between Williams's protected activity and Stevens's adverse treatment of him, his retaliation claim against Stevens fails. *Cf.*

[7] I note that Williams has argued that his letter to Raemisch constituted protected activity, nor did he allege such a claim in his complaint. Like his claims against the other defendants, his retaliation claim against Stevens rests on his theory that Stevens took adverse action against him in retaliation for filing lawsuits against the warden, department secretary and another security officer. Accordingly, he has waived any retaliation claim that might have been brought on the basis of the letter to Raemisch. *Local 15, Int'l Bhd. of Elec. Workers v. Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007) (party waives any argument that it does not raise before district court).

Vukadinovich v. Bd. of Sch. Trs. of N. Newton Sch. Corp., 278 F.3d 693, 700 (7th Cir. 2002) (finding employee's subjective belief insufficient to prove retaliatory motive).

D. Defendants Schultz, Gavin and Campbell

The same goes for Schultz, Gavin and Campbell, who were the hearing officers who adjudicated and found him guilty of the three conduct violations just discussed. As with Stevens, Williams has failed to point to any evidence to show any causal connection between his protected activity and the actions taken by these defendants. The mere fact that the officers who *wrote* the reports might have been motivated to retaliate against Williams does not, by itself, establish that the hearing officers held the same animus. *See Felton v. Ericksen*, 366 Fed. Appx. 677, *2 (7th Cir. March 4, 2010) (nonprecedential disposition) ("But Swiekatowski, not these defendants, authored the conduct report, and it is not reasonable to infer that either defendant shared any improper motive with Swiekatowski simply because Ericksen was the security director and Brant served on the disciplinary committee."); *Wilson v. Greetan*, 571 F.Supp.2d 948, 955 (W.D. Wis. 2007) (hearing officer may not be held liable for retaliatory conduct report if plaintiff fails to show that hearing officer shared animus held by officer who wrote report).

To the extent that Williams complains that these defendants denied him certain procedural protections at the due process hearing and entered findings of guilt that were not supported by the evidence, these claims are best evaluated under the due process clause. Finally, the fact that Campbell was a defendant in one of Williams's prior lawsuits, though perhaps sufficient to support an inference that he was aware of the suit, is not alone enough to permit an inference that retaliation was a motivating factor behind his finding of guilt.

In the end, all Williams has with respect to these defendants is his own belief that they retaliated against him. This is insufficient to defeat summary judgment. *See Cain v. Lane*, 857 F.2d 1139, 1143 n. 6 (7th Cir. 1988) (merely alleging the ultimate fact of retaliation is insufficient to reasonably infer retaliation).

E. Ericksen

Williams has failed to identify any evidence from which a jury can infer retaliatory motive by Ericksen. First, he has no direct or circumstantial evidence from which a jury could infer that Ericksen harbored any retaliatory animus towards him; indeed, there is no evidence that Ericksen even knew about Williams's protected activity. Second, although Williams complains of a host of allegedly retaliatory activities, such as requiring him to submit a urine sample, suspending one of his visitors, and moving him to cold cells, Williams fails to adduce any admissible evidence that these actions were taken or ordered by Ericksen.

Williams appears to seek liability against Ericksen for "approving" the conduct reports written by other security staff. However, the doctrine of *respondeat superior*, under which a supervisor may be held liable for an employee's actions, has no application to section 1983 actions. *Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010). Ericksen can only be held liable for damages if he subjected or caused Williams to be subjected to a constitutional violation. *E.g., Morfin v. City of East Chicago*, 349 F.3d 989, 1001 (7th Cir. 2003). This means that Ericksen "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see." *Jones v. City of Chicago*, 856 F.2d 985, 992–93(7th Cir. 1988). Here, Williams has not shown that Ericksen reviewed or approved the three conduct reports that are

the subject of this lawsuit. Even if Williams could make this showing, his retaliation claim against Ericksen still would not survive because Williams has insufficient evidence to permit a jury to find that any of the three reports were fabricated, much less that Ericksen *knew* they were fabricated. The mere fact that Ericksen headed the security department is insufficient to show his personal responsibility for the alleged constitutional deprivations of his staff. Williams's retaliation claim against Ericksen cannot be sustained.

F. Pollard and Raemisch

Williams's only allegation against defendants Pollard and Raemisch is that they retaliated against him by failing to take corrective action. However, a prison official may be held liable under § 1983 only if she caused the constitutional violation; Williams may not sue individuals for failing to correct a violation that already has occurred. *Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir. 2009) (rejecting "contention that any public employee who knows (or should know) about a wrong must do something to fix it"); *George v. Smith*, 507 F.3d 605, 609 (7th Cir. 2007) (rejecting argument "that anyone who knows about a violation of the Constitution, and fails to cure it, has violated the Constitution himself"). Accordingly Pollard and Raemisch are entitled to summary judgment.

III. Conditions of Confinement

The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon jail officials the duty to "provide humane conditions of confinement" for prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). As with other claims arising under the Eighth Amendment,

a prisoner seeking to prevail on a conditions of confinement claim must satisfy both an objective and subjective component. *McNeil v. Lane*, 16 F.3d 123, 124 (7th Cir.1994); *see also Wilson v. Seiter*, 501 U.S. 294, 302 (1991). The objective component focuses on the nature of the acts or practices alleged to constitute cruel and unusual punishment, examining whether the conditions of confinement exceeded contemporary bounds of decency of a mature civilized society. *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir.1992). The condition must result in unquestioned and serious deprivations of basic human needs, or deprive inmates of the minimal civilized measure of life's necessities. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *accord Jamison–Bey v. Thieret*, 867 F.2d 1046, 1048 (7th Cir.1989); *Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir.1987).

In addition to showing objectively serious conditions, a plaintiff must also demonstrate the subjective component of an Eighth Amendment claim, in other words, the intent with which the acts or practices constituting the alleged punishment are inflicted. *Jackson*, 955 F.2d at 22. This requires that a prison official have had a sufficiently culpable state of mind. *Wilson*, 501 U.S. at 298. The subjective component is satisfied if the plaintiff shows that the prison official acted or failed to act despite the official's knowledge of a substantial risk of serious harm. *Farmer*, 511 U.S. at 842.

A. Cold

Williams alleges that he was housed in cells in the segregation unit where the temperature during the winter months was uncomfortably cold in the 30s (presumably Fahrenheit). Prisoners have a right to adequate ventilation and freedom from extreme temperatures. *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1087 (7th Cir. 1986). However, this right is not equivalent

to a right to be free from all discomfort. *Id.; see also Hudson v. McMillan*, 503 U.S. 1, 9 (1992) ("routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society'")(internal citation omitted). The same Eighth Amendment standard applies to ventilation and cell temperature as to other conditions of confinement: whether the condition subjected the inmate to a substantial risk of serious harm and whether defendants were deliberately indifferent to the risk. *Murphy v. Walker*, 51 F.3d 714 (7th Cir. 1995).

In *Dixon v. Godinez*, 114 F.3d. 640 (7th Cir. 1997), the court identified a number of facts courts should consider when assessing claims based on low cell temperature, including the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold. *Id*. at 644. "Cold temperatures need not imminently threaten inmates' health to violate the Eighth Amendment." *Id*. In *Dixon*, the court found that the plaintiff's unrefuted testimony that ice persistently formed on the walls of his cell during the winter months, that the condition had persisted for several winters and that his standard prison-issue clothing did not keep him warm sufficed to create a material dispute that precluded summary judgment. *Id*.

Defendants assert that Williams cannot prevail on this claim because he has no evidence to refute defendants' evidence showing that the thermostat on the unit is set at 74 degrees and that no major repairs were done on GBCI's HVAC system in the winter of 2010. As Williams points out, however, defendants admit that temperature readings are not taken in individual cells, so the thermostat setting for the entire unit does not necessarily disprove Williams's claim that the temperatures in the cells themselves are much lower. Williams has averred that ice forms on

the windows of the segregation cells during the winter months, he has indicated that his prison-issued clothing and blankets do not provide adequate warmth and he describes the cold as "torturous." Although this is not overwhelming proof of his claim that the cold temperatures subjected him to a substantial risk of serious harm, when the evidence is viewed in the light most favorable to Williams, it probably is enough to create a genuine dispute of fact on this issue.

Nonetheless, plaintiff's claim still fails because he has not proposed any facts that would support a finding that any of the defendants he has named in this suit knew of the freezing temperatures in plaintiff's cell and were deliberately indifferent to it. The only named defendants who arguably were aware of plaintiff's complaints about the cold were Pollard, the warden, and Raemisch, the Secretary of DOC. Although plaintiff fails to identify precisely what it is that these defendants did or failed to do, his evidence shows only that these defendants failed to respond to letters he wrote (one to each) in which he indicated that his cell was cold, and Pollard affirmed the ICE's dismissal of his complaint. This is not enough to show that either of these officials was deliberately indifferent.

With respect to Pollard, the record shows that he was aware from reviewing Williams's grievance that the temperature complaint had been investigated by maintenance staff, who found that the temperature on the wing was 74° F. Apart from that grievance, the only communication that Pollard received from Williams regarding the cell temperature was a brief letter two days later saying that the ventilation system was blowing cold air.[8] Given the temporal proximity of that

[8] Although plaintiff has submitted evidence from several inmates who say they also filed complaints about he cold, he has not submitted the complaints themselves or pointed to evidence showing that Pollard was aware of each of these complaints.

complaint to the one Pollard had reviewed two days earlier in which staff had found Williams's complaints to be unfounded, I am satisfied that no reasonable juror could find that Pollard knew he was exposing Williams to a substantial risk of serious harm by failing to personally investigate the complaint. *See Steidl v. Gramley*, 151 F.3d 739, 741–42 (7th Cir. 1998) (warden is not responsible for individual incidents that occur in day-to-day operation of a prison, but only for systematic lapses in policies meant to protect prisoners); *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009) (Prison directors and wardens are "entitled to relegate to the prison's medical staff the provision of good medical care."); *George v. Smith*, 507 F.3d 605, 609–10 (7th Cir. 2007) ("Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation.").

It follows that if the warden could not be found deliberately indifferent, then neither could Raemisch. Raemisch was secretary of the entire Department of Corrections. He received one letter from plaintiff complaining about the cold cell temperatures in the GBCI segregation unit. This is not enough to make him personally responsible for or deliberately indifferent to a known threat to William's health or safety. *Burks*, 55 F.3d at 595 ("Burks's view that everyone who knows about a prisoner's problem must pay damages implies that he could write letters to the Governor of Wisconsin and 999 other public officials, demand that every one of those 1,000 officials drop everything he or she is doing in order to investigate a single prisoner's claims, and then collect damages from all 1,000 recipients if the letter-writing campaign does not lead to better medical care. That can't be right.").

B. Cell illumination

Williams has alleged that the constant illumination of his cell aggravated his mental illness and caused him to suffer insomnia and migraine headaches. In order to succeed on a claim of illegal illumination, Williams must produce evidence that the constant illumination had harmful effects on his health beyond mere discomfort. *Farmer*, 511 U.S. at 834 ("the deprivation alleged must be, objectively, "sufficiently serious"; a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities". . . . the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm") (internal citations omitted).

Williams has failed to make the necessary showing at a time when he must do so. *Schacht v. Wisconsin Dept. of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999) (summary judgment"is the 'put up or shut up' moment in a lawsuit"). Williams was treated by health service staff for headaches, blurry vision, insomnia and depression, but there is no factual support for Williams's assertion that the constant illumination caused or exacerbated his medical problems. In other words, the facts show only that Williams was subjected to 24-hour illumination, that he complained of symptoms, some of his symptoms were treated by health services, and *Williams* believes that these symptoms were caused by the conditions of the segregation unit. Williams's subjective belief alone does not create a causal link between the illumination and his symptoms. *Powers v. Dole*, 782 F.2d 689,695 (7th Cir. 1986) ("Conclusory allegations that have no factual support are insufficient to create a genuine issue of material fact").

Even if Williams could prove that constant illumination subjected him to a substantial risk of serious harm, summary judgment would be appropriate because he has not demonstrated that

defendants failed to respond reasonably to any risk of harm that constant illumination might cause. Williams has not proposed any facts showing that any particular defendant knew that he was bothered by the lighting. Further, the evidence shows that Williams was treated by medical staff for his headaches and prescribed new eyeglasses, after which his headaches resolved. He was prescribed trazodone for his insomnia, which he found to be helpful.

Finally, Williams admits that defendants cannot meet their security needs without the ability to observe the inside of the cell at all times. Although Williams suggests this need could be met at night by having staff shine a flashlight into the cell, defendants point out that a bright beam shone into a cell at unpredictable intervals is likely to be more annoying and disruptive to sleep than the constant low-wattage illumination. In addition, the flashlight alternative has the potential to increase conflict between inmates and staff, insofar as staff would have some discretion as to how long it was necessary to shine the light into the cell, thereby creating a situation ripe for claims of inmate harassment. If defendants have no meaningful alternative to 24-hour lighting, this provides yet another reason for concluding that defendants are not violating Williams's Eighth Amendment rights. *King*, 371 F. Supp.2d at 985, (citing *Bruscino v. Carlson*, 854 F.2d 162, 165 (7th Cir. 1988) ("If order could be maintained in [United States Penitentiary in Marion, Illinois] without resort to the harsh methods attacked in this lawsuit, then Williams would have a stronger argument that the methods were indeed cruel and unusual punishments."

C. Noise

Williams contends that the noise levels in GBCI's segregation wing are extreme and can persist for up to 10-12 hours, thus interfering with his sleep. Although a few hours of periodic

noise have been found insufficient to pose a risk of injury, *see Lunsford v. Bennett*, 17 F.3d 1574 (7th Cir. 1994), the infliction of incessant noise, especially if it interrupts or prevents sleep, may violate the objective component of Eighth Amendment. *See Antonelli v. Sheahan*, 81 F.3d 1422, 1433 (7th Cir. 1996). Williams, however, has failed to adduce evidence that the noise in the segregation unit is "incessant." He says the noise "can go on" for 10-12 hours continuously, but he does not say whether this is typical or how many times in a given week this occurs. An occasional disruption of sleep is insufficient to show an " unquestioned and serious" deprivation of basic human needs.

Further, Williams has not shown that any of the defendants named in this suit acted with the requisite intent to show an Eighth Amendment violation. Notably, he has not shown that GBCI's warden, security directory or correctional officers have measures reasonably available to curb or isolate noisy inmates or that they have refused to employ these measures. In his affidavit, Williams suggests that noisy inmates can be isolated on the 600 wing or that GBCI could "designate a wing for the most disruptive inmates." Aff. of Derek Williams, dkt. 64, ¶63. However, Williams does not explain what or where the "600 wing" is. Additionally, as defendants point out, GBCI *has* designated a wing for the most disruptive inmates—the segregation wing. Defendants are entitled to summary judgment on this claim.

D. Use of Chemical Agents

Williams has failed to show that the use of chemical agents on the segregation unit had any harmful effects on him. Although Williams contends generally that indirect exposure to the chemical agents used at GBCI can cause irritated skin, burning eyes, and non-stop coughing and

choking, he does not allege that *he* actually suffered such symptoms each of the 71 times that he says he was indirectly exposed to the spray, much less that any of the defendants knew he was suffering such symptoms. He only says that he "felt the effects" of the agents 71 times. Such a vague, general assertion does not show that Williams was deprived of the minimal civilized measure of life's necessities, or that the defendants knew that Williams was at substantial risk of serious harm, and then failed to take appropriate action.

E. Recreation

Williams complains that the opportunities for out-of-cell recreation in segregation are inadequate, particularly during the winter months. Lack of exercise may rise to the level of a constitutional violation in extreme and prolonged circumstances where movement is denied to the point that the inmate's health is threatened. *Antonelli*, 81 F. 3d at 1422. Williams's allegations in this case do not rise to that level. Williams does not propose specific facts showing how often out-of-cell recreation was available to him during his stay in segregation. Williams does not deny that he was free to exercise in his cell. Williams proposes no facts showing that he suffered any health problems as a result of lack of exercise.

F. Overall Conditions

Finally, Williams alleges that his mental health deteriorated to the point where he needed psychiatric care because of the combined effects of the various conditions in segregation. However, the mere fact that Williams's mental health deteriorated *while* he was in segregation—which is all Williams has shown here—does not establish that it deteriorated *because*

of the conditions in segregation. To establish an Eighth Amendment claim, Williams must come forth with medical evidence showing that it was defendants' actions and not his own underlying condition that caused him harm. *See Williams v. Liefer*, 491 F.3d 710, 714-715 (7th Cir. 2007). Williams has not adduced such evidence, offering only his own conclusion about causation. His own lay opinion, however, is not admissible on the question of causation. *United States v. Cravens*, 275 F.3d 637, 640 (7th Cir. 2001) ("Although a lay person may readily observe a drug or alcohol problem, the *causation* of a mental disease or defect is a more technical medical determination such that a court would find expert testimony particularly useful to its ultimate decision.") (emphasis in original); *Goffman v. Gross*, 59 F.3d 668, 672 (7th Cir.1995) (holding that lay testimony is not sufficient to establish plaintiff's claim that secondhand smoke caused his symptoms).

In sum, Williams has failed to show that the conditions of confinement were sufficiently serious to give rise to an Eighth Amendment claim or that defendants were deliberately indifferent to any risk posed to Williams as a result of those conditions. To the contrary, the facts show that Williams was able to consult with a psychiatrist when he needed to. In response to Williams's depression and several acts of self-mutilation, GBCI staff quickly intervened, which included prescribing antidepressants to stabilize Williams's mood and help him sleep. There is no indication that the treatment professionals deemed it necessary to transfer Williams out of segregation, even when he complained of the noise in segregation (in conjunction with his report of auditory hallucinations involving the voice of his dead former pyschologist). The evidence suggests that the antidepressants sufficed to stabilize Williams's mood. Accordingly, defendants are entitled to summary judgment on this claim.

III. Due Process

Williams contends that he was denied the right to procedural due process at each of the disciplinary hearings on the conduct reports. The right to due process vests only in connection with the deprivation of a protected property or liberty interest. *Hamlin v. Vaudenberg*, 95 F.3d 580, 584 (7th Cir. 1996). With respect to segregation, the Supreme Court has held that due process protections are required only when the prisoner faces a deprivation of liberty that imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (quoting *Sandin v. Conner*, 515 U.S. 472 , 483-84 (2005)). The Court of Appeals for the Seventh Circuit has interpreted this to mean that, when determining whether a term of segregation gives rise to a liberty interest, courts must consider both the length of the confinement and the conditions of segregation. *Marion v. Columbia Corr. Institution*, 559 F.3d 693, 697-98 (7th Cir. 2009) . Where the term of confinement is short, no liberty interest is implicated, regardless of conditions. *Id*. When the term of confinement is long, then courts are to examine the conditions of confinement to determine whether they are "considerably harsher than those of the normal prison environment." *Bryan v. Duckworth*, 88 F.3d 431, 433 (7th Cir. 1996) (abrogated on other grounds by *Spencer v. Kemna*, 523 U.S. 1 (1998)). Terms of a year in segregation have been found to require a factual inquiry into the conditions of confinement. *Marion*, 559 F.3d at 698.

Defendants argue that in a recent case, the Seventh Circuit appears to have suggested that in the context of a prison sentence, a protected liberty interest arises only in two situations: transfer to a mental hospital or the involuntary administration of psychotropic drugs. *Gruenberg v. Gempeler*, 697 F.3d 573, 580-81 (7th Cir. 2012). I do not read *Gruenberg* so broadly. In

upholding the district court's conclusion that due process was not implicated by the prisoner's confinement in restraints for five days, the appellate court first observed that there was no evidence showing that Williams was restrained as punishment for swallowing keys; to the contrary, "the record entirely support[ed] the defendants' contention that placing Gruenberg in restraints was solely out of a concern for security." *Id*. at 580. Almost as an afterthought, the court observed:

> Furthermore, we have found only two instances in which the Fourteenth Amendment's due process clause created a liberty interest in the context of a prison sentence: a transfer to a mental hospital, *see Vitek v. Jones*, 445 U.S. 480, 493, 100 S.Ct. 1254, 63 L. Ed.2d 552 (1980), and the involuntary administration of psychotropic drugs, *see Washington v. Harper*, 494 U.S. 210, 221–22, 110 S.Ct. 1028, 108 L. Ed.2d 178 (1990). Neither is implicated here, and we have previously held that claims such as those raised by Gruenberg here "are better conceptualized under the Eighth Amendment." *Bowers*, 345 Fed. Appx. at 196.

Id. at 580-81.

This paragraph, which seems to be dicta and includes a citation to an unpublished opinion, fails does not support the notion that the court was extinguishing all due process claims in the prison context other than transfers to mental hospitals and the involuntary administration of psychotropic drugs. Notably, the court did not overrule *Marion*, much less mention it. I decline to find that the reach of the due process clause in prison has been narrowed to the two scenarios mentioned in passing in *Gruenberg*. Instead, I will follow *Marion* and examine the length of Williams's term of segregation and the conditions of that confinement.

Defendants concede that Williams's term of segregation was substantial, the longest (for conspiracy to distribute drugs in the institution) being 360 days. *See Marion*, 559 F.3d at 699

(term of 240 days required evaluation of conditions).[9] This means that the court must examine the conditions of confinement in segregation to determine whether they are sufficiently severe to qualify as "atypical and significant." As discussed above, Williams has adduced sufficient admissible evidence--although just barely—to show that the cold temperatures in his segregation unit cells were so harsh as to meet the objective component of an Eighth Amendment claim. I will assume that this allows him to proceed on his due process claim. His claim fails, however, under the rule of *Parratt v. Taylor*, 51 U.S. 527, 543-44 (1981).

Parratt and its progeny hold that when an alleged deprivation occurs not at the hands of the state, but instead at the hands of an employee who acts in contravention of state policies and procedures, no due process violation will lie unless the state fails to afford adequate post-deprivation remedies to address the deprivation. *Id*.; *Daniels v. Williams,* 474 U.S. 327 (1986); *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). *See also Hamlin v. Vaudenberg*, 95 F.3d 580, 584 (7th Cir. 1996); *Duenas v. Nagle*, 765 F. Supp. 1393, 1399 (W.D. Wis. 1991). Here, Williams is not contending that Wisconsin has made a conscious decision to ignore the protections guaranteed by the constitution, namely, advance written notice of the claimed violation, the right to appear before an impartial hearing panel, the right to call witnesses and present documentary evidence if prison safety allows, and a written statement of the reasons for the discipline imposed, *Wolff v. McDonnell*, 418 U.S. 539, 563–69 (1974), or the substantive requirement that the decision of the hearing committee be supported by "some evidence." *Superintendent v. Hill*, 472

[9]Although the Seventh Circuit has held that sanctions imposed for separate disciplinary charges must be evaluated independently, *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001), defendants seem to evaluate Williams's sanctions in the aggregate. As discussed below, in the end it makes no difference because even if Williams can establish a protected liberty interest in being free from placement in segregation, his due process claim is barred under the "random and unauthorized" doctrine.

U.S. 445 (1985). Instead, he is claiming that each of the hearing officers who decided the three conduct reports failed to comply with these procedures when they presided over the hearings on the conduct violations.

As discussed in detail in *Hamlin* and *Duenas*, *Parratt* and its progeny hold that any deprivations of due process resulting from such "random and unauthorized acts" do not give rise to a constitutional due process violation so long as adequate state post-deprivation procedures exist to remedy the deprivation. *Hamlin*, 95 F.3d at 584; *Duenas*, 765 F. Supp. at 1397. "The Court reasoned that when a deprivation is the result of a state actor's random and unauthorized conduct, the state cannot predict that such conduct will occur, and consequently it is futile or impossible for the state to guard against the deprivation by mandating additional *pre* deprivation procedures." *Duenas*, 765 F. Supp. at 1397. In such cases, "the state can be expected only to provide an adequate *post* deprivation remedy." *Id*. In *Duenas*, the court determined that Wisconsin's post-deprivation remedies are adequate, *id.* at 1400, a conclusion later confirmed by the Court of Appeals for the Seventh Circuit in *Hamlin*, 95 F.3d at 585.

Williams does not offer any argument in response to defendant's contention that the complained-of acts by the hearing officers were random and unauthorized and that Wisconsin's post-deprivation remedies are adequate. Instead, Williams argues that the *Parratt* doctrine does not apply to First Amendment retaliation claims. That may be so, but it is beside the point: Williams has made procedural due process claims *in addition* to his retaliation claims, and it is *these* claims that defendants contend are barred under *Parratt*. Williams has offered nothing else in opposition to defendant's *Parratt* argument. This essentially concedes the point. Defendants' are entitled to summary judgment on Williams's due process claims.

ORDER

IT IS ORDERED that:

1. Williams's motion to strike portions of defendants' reply brief, dkt. 76, is DENIED as unnecessary.

2. Williams's motion to correct certain typographical errors in his response to the proposed findings of fact, also dkt 76, is GRANTED.

3. Defendants' motion for summary judgment, dkt. 43, is GRANTED in its entirely.

4. In light of this, Williams's motion to compel, dkt. 82, is DENIED as moot.

Entered this 29th day of March, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge