IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALPHONCY DANGERFIELD, CARLOS A. AUSTIN, LAMONT E. MOORE, TINGIA WHEELER, BARON L. WALKER, SR., JOEDDIE SMITH, JOHN D. TIGGS, JR., RASHID TALID and WALTER BROWN, SR.,

Plaintiffs,

v.

JON E. LITSCHER, RICHARD SCHNEITER, WILLIAM NOLAND, RICHARD VERHAGEN, TIM DOUMA and JEFFREY P. ENDICOTT,

Defendants.

OPINION AND ORDER

99-C-480-C

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In this civil action for injunctive, declaratory and monetary relief, plaintiffs Alphoncy Dangerfield, Carlos A. Austin, Lamont E. Moore, Tingia Wheeler, Baron L. Walker, Sr., Joeddie Smith, John D. Tiggs, Jr., Rashid Talid and Walter Brown, Sr. contend that defendants Jon E. Litscher, Richard Schneiter, William Noland, Richard Verhagen, Tim Douma and Jeffrey P. Endicott discriminated against them on the basis of race in violation of the equal protection clause of the Fourteenth Amendment when defendants placed them on administrative tracking and administrative confinement at Columbia Correctional

Institution and violated their rights under the Eighth Amendment by subjecting them to extreme cold and to bug infestations in their cells. In an order entered October 11, 2000, I denied defendants' motion for summary judgment raising the defense of plaintiffs' failure to exhaust administrative remedies on their equal protection claim and plaintiff Walker's failure to exhaust his administrative remedies on his claim under the Eighth Amendment. In the same order, I granted defendants' motion with respect to the remaining plaintiffs on their Eighth Amendment claims. Presently before the court is defendants' motion for summary judgment on the merits of plaintiffs' equal protection and Eighth Amendment claims. (Counsel was appointed for plaintiffs on November 16, 2000. While plaintiffs were proceeding pro se, they filed a motion for summary judgment. Although that motion was never formally withdrawn, it is clear from plaintiffs' submissions in response to defendants' motion that plaintiffs have abandoned their motion for summary judgment.)

In support of their motion for summary judgment, defendants contend that plaintiffs were placed in administrative confinement for legitimate, non-discriminatory reasons and that plaintiffs are not situated similarly to white inmates who were not placed in administrative confinement. Defendants contend that plaintiff Walker has not established that he was subjected to sufficiently serious harm to state a claim under the Eighth Amendment and alternatively that he has not proven that defendants Douma, Schneiter and Endicott were involved personally in any Eighth Amendment violation. I conclude that

plaintiffs have failed to adduce evidence that they were situated similarly to any white inmate who was not placed in administrative confinement and that defendant Walker has failed to show that any defendant was deliberately indifferent to the conditions in his cell. Therefore, defendants' motion for summary judgment will be granted as to both the equal protection and Eighth Amendment claims.

From the findings of fact proposed by the parties, I find that the following are material and not disputed.

UNDISPUTED FACTS

A. Equal Protection Claim

1. Placement in administrative confinement

Administrative confinement allows prison staff to separate disruptive or violent inmates from other inmates, staff and general institution activities in order to protect that inmate, other inmates, staff or the institution as a whole from disruptive activities or disturbances. Inmates placed in administrative confinement have demonstrated behavior that leads prison staff to believe that they pose a risk of hurting someone else or otherwise being disruptive in the institution. An inmate who is being considered for possible referral to the administrative confinement review committee would likely be in a punitive segregated status for committing a serious rule violation that has had a negative effect on the safety and

security of the institution staff, inmates or the public. In most cases, the incident that resulted in placing the inmate in punitive segregation is a strong factor in considering placement in administrative confinement. Equal weight is not given to all serious rule violations in considering administrative confinement referral. Generally, the following types of incidents lead to administrative confinement referral: serious batteries, participation in riots, conspiracies to cause disruption or injury to others, gang leadership and escape attempt. However, committing these offenses does not lead automatically to administrative confinement. Instead, the facts behind the offenses are reviewed and a determination is made as to the type of risk the inmate poses. Generally, disobeying orders, disrespect, lying, disruption, possession of contraband, possession and use of intoxicants and gang offenses are routine offenses that in and of themselves, and absent a context, will not automatically lead to administrative confinement referral. An inmate's ties to a gang will act as an enhancer for some conduct reports, meaning that gang-relatedness enhances the risk of future violence. For example, a gang-related battery will generate more concern for future safety because there is a possibility of retaliation, involvement of more gang members and rival gang members and the greater possibility that a riot will result. Any gang-related activity is potentially threatening to the correctional setting. The specific concerns are that disruptive groups may organize anything from minor misconduct up to disturbances. Gangs are also connected to illegal drug activity within the institutions, strong-arming other

inmates and other illegal activities.

All inmates serving program segregation time are considered for administrative tracking automatically. Administrative tracking is a designation placed on the records of inmates who have committed a serious rule violation to identify those inmates as dangerous and posing a risk to institution safety or security. The designation indicates an intent to refer the inmate to the administrative confinement review committee for possible placement in administrative confinement following completion of his segregation sentence and allows staff to consider the possible administrative confinement referral in making a punitive segregation management decision. The designation allows staff to keep inmates from progressing inadvertently to levels of movement and freedom that were not intended. A combination of factors in the individual conduct history of each plaintiff named in this case contributed to the recommendation to place that plaintiff in administrative confinement.

An inmate cannot be referred to administrative confinement until he has completed his punitive segregation sentence. Inmates are placed in administrative confinement by the administrative confinement review committee, which is composed of three people. The security director or his staff generate for the committee a referral document compiled from a review of the inmate's conduct history. That review includes identifying incidents of dangerousness, either during or before incarceration because prison staff is concerned with identifying a history or potential for violence. The inmate receives the referral packet and

is assigned a staff advocate to assist him in preparing for and appearing at the hearing. The inmate can request that the referral report writer and two other witnesses attend the committee hearing. The inmate is given time to prepare for the hearing. At the hearing, he may testify and submit questions for any witnesses. The warden's role in the administrative confinement process is to make a periodic review of inmates who have been placed in administrative confinement and recommend that they continue in administrative confinement or be considered for release from administrative confinement.

Defendant Timothy Douma has been employed as Institution Security Director 2 at Columbia Correctional Institution since January 3, 1999. From September 18, 1995 until August 1998, he held the position of administrative captain. In August 1998, he became the acting institution security director at Columbia Correctional Institution. As Institution Security Director 2, Douma is head of the security department, consisting of approximately 235 staff members. His responsibilities include the review and processing of all conduct reports and incident reports, making assignments for follow-up and responding to correspondence from staff, inmates and the public. He also maintains security records at Columbia Correctional Institution.

In response to an inquiry from plaintiff's attorney in this case, Douma and his staff tried to compile a list of the names of inmates who had been placed in administrative confinement at Columbia Correctional Institution. No independent list of this nature exists.

Douma and his staff took several steps to compile the list. First, they reviewed all investigation files kept in the institution investigation office. The investigations sergeant is Alan Morris, who has held the position since 1997. Morris searched the files for all administrative confinement referrals. The investigation files are confidential. Morris generated a list of inmates referred for administrative confinement. Morris instituted a new record-keeping system. Before that time the record-keeping was incomplete. Douma reviewed the list generated by Morris and circulated that list among other security staff to check its accuracy. This list was not complete. Douma remembered four inmates who had been placed in administrative confinement whose names did not appear on the list. In order to compile a more complete list, Douma directed two program assistants to review institution transfer logs. The program assistants reviewed three transfer logs from Columbia Correctional Institution disciplinary segregation unit I and two transfer logs from Columbia Correctional Institution disciplinary segregation unit II. The unit I logs date back to 1986 and the unit II logs date back to 1987. All logs reviewed consist of approximately 300 pages containing approximately 40 single line entries. The program assistants reviewed the logs for any entry that might indicate that an inmate was moved to administrative confinement. That information was cross-referenced on the Corrections Integrated Program Information System, which stores inmate movement and other basic information about Wisconsin inmates. At that time, the race and date of birth of the inmate were added to the list on the

basis of the Corrections Integrated Program Information System information. Once that list was complete, Douma reviewed the list and gave it to Richard Schneiter for the same purpose. Because of their experience as Columbia Correctional Institution security directors, they expected that many of the names would be familiar to them if the inmates had been placed in administrative confinement. Douma and Schneiter identified approximately 20 inmate names they thought should not be on the list because they did not remember placing those inmates into administrative confinement. The names of the inmates whose status could not be confirmed are listed on a separate list titled, "Possible A.C. Suspect Placements." Confirmation of their status should be found in the social services section of the Corrections Integrated Program Information System record but for unknown reasons the social services section of the records tends to lack entries before 1991. The designation of an inmate's race on the list may not be accurate. Hispanic inmates are labeled "white" instead of "Hispanic." Some Native American inmates may be classified as "white." There is at least one Saudi Arabian inmate labeled "Native American." Therefore, Douma cannot swear that this list is an accurate list of the inmates placed in administrative confinement at Columbia Correctional Institution.

Defendants can specify details of the crimes for which inmates are now incarcerated. Defendants keep records of how many and what type of conduct reports the inmates have received, on specific dates, while incarcerated at Columbia Correctional Institution and at

other facilities. These conduct reports are numbered and detailed. Defendants keep a record of the disposition of offenses. Defendants keep a record of the number of days an inmate spends in the general population during his sentence. Defendants keep a record of the exact dates an inmate spends in segregation during his sentence. Defendants keep a record of the rooms or cells in which an inmate is located or transferred during his sentence. Defendants do not maintain a list of inmates who have been placed in administrative confinement at Columbia Correctional Institution. Defendant Douma and his staff had to go through several steps in order to compile such a list. Even after composing a list, Douma could not swear that the list was accurate.

Douma is responsible for referring inmates to the administrative confinement review committee for possible placement into administrative confinement. Defendant Endicott reviews inmates who have been placed in administrative confinement and recommends that they continue or be considered for release from administrative confinement. Inmates on administrative tracking or confinement are reviewed every 30 days. "Administrative tracking" is not found in DOC § 303 or DOC § 308 but is a designation established at Columbia Correctional Institution. Although the tracking designation can be removed, an inmate placed on administrative tracking will likely retain that designation throughout his segregation sentence.

Dangerousness can be established on an extensive history of disruptive or assaultive

offenses. Inmates from the general population have been referred for administrative tracking when they were placed in temporary lockup. The list generated by defendant Douma indicates that since the inception of administrative tracking in 1987, a disproportionate number of non-whites have been placed on it.

The determination to place an inmate on administrative tracking is not appealable by the inmate. Each of the plaintiffs was on program segregation at Columbia Correctional Institution, designated for administrative tracking and referred to the administrative confinement review commission for administrative confinement. Each plaintiff was placed ultimately in administrative confinement. During the time that plaintiffs were on administrative tracking designation or in administrative confinement, Columbia Correctional Institution did not keep statistical information about the race of those inmates.

The Department of Corrections has kept racial statistics on the inmates confined in the Wisconsin prison system for many years. Columbia Correctional Institution has kept racial statistics since its inception in 1986. The records department at Columbia Correctional Institution keeps a monthly record of the racial demography of its inmates using the categories white-Hispanic, white-non Hispanic, black-Hispanic, black-non Hispanic, American Indian, Asian, other and no data. Defendant Schneiter was not aware of the racial breakdown of individuals placed on administrative tracking or referred to and placed on administrative confinement.

2. Plaintiffs' Offenses

Plaintiff Alphoncy Dangerfield was incarcerated for a gang-related homicide resulting from a dispute over drug sales between Dangerfield's gang and another gang. During his incarceration, Dangerfield developed a history of open defiance toward staff in front of large groups of other inmates. Dangerfield participated in two riots, one in 1994 and one in 1998. In 1994, Dangerfield battered another inmate by kicking him in the head as officers restrained the other inmate. In 1998, Dangerfield participated in a riot in which a large group of inmates at Green Bay Correctional Institution left the dining room. As officers tried to quell the disturbance, Dangerfield and the group surrounded staff. Dangerfield tried to prevent other staff from responding to the disturbance by kicking and striking at least three of the officers. Dangerfield kicked a female officer in the head as he said, "Fuck you, bitch." Staff received multiple injuries as a result of the disturbance. At least three staff members and one inmate were injured during the riots; Dangerfield kicked an inmate in the head and kicked and struck the three officers. Dangerfield has received 77 conduct reports since 1990.

Plaintiff Tingia Wheeler was incarcerated for first degree intentional homicide for shooting a friend in the head at point-blank range, with the victim on his knees, over a money dispute. Wheeler has ties to the Gangster Disciples gang. Since 1996, Wheeler has received at least three gang related conduct reports. In February 1998, Wheeler participated

with Dangerfield in the riot at Green Bay Correctional Institution during which Wheeler punched two officers repeatedly and kicked an officer. Wheeler and three other inmates left one dining hall and tried to enter another. As an officer stepped in front of Wheeler to stop him, he pushed the officer in the chest. A large group of 20 to 25 inmates formed around as the officer tried to ask Wheeler for his name and number. Wheeler replied, "Suck my dick." Wheeler and the group of inmates then moved toward the other dining hall. Wheeler attacked an officer, striking him repeatedly in the head and neck. As officers tried to subdue Wheeler, he resisted by kicking them and striking one in the knee. The staff involved in the incident required medical attention. After Wheeler was transferred to Columbia Correctional Institution, he had a dispute with his cellmate and when staff tried to talk to him, Wheeler threatened to kill his cellmate. After staff handcuffed the other inmate and tried to handcuff Wheeler, Wheeler tried to pull away from staff and go after the restrained cellmate. Wheeler committed this act while already in segregation. Wheeler also received three gang-related conduct reports while in segregation.

Plaintiff Walter Brown was a gang leader in a disturbance at Jackson Correctional Institution. During the disturbance, a group of approximately 17 inmates showing allegiance to the Vice Lords gang assaulted two inmates who were trying to resign from the gang. When staff tried to intervene, they were forced to stop restraining one of the attackers and Brown ordered them to release that attacker, stating, "He's ours. You better let him go or

we'll take him back." Six staff and two inmates received outside emergency medical treatment as a result of the disturbance. The assault escalated into a serious riot in which six staff members and two inmates were injured and received emergency medical treatment at a local hospital.

Plaintiff Joeddie Smith was incarcerated for first degree reckless injury for shooting his victim three or four times with a sawed-off shotgun. Smith is a member of the Vice Lords gang and has received at least one conduct report for trying to send gang related letters to three fellow Vice Lord members. Smith was involved in the same 1997 Jackson Correctional Institution disturbance as Brown. Smith disregarded staff's orders to disperse and was involved directly in the assault of the other inmates. Smith attacked one officer violently, striking him in the face and knocking him to the ground, as the officer was trying to help other staff restrain inmates. During the riot, Smith was observed laughing as he attacked at least three officers. After the riot, Smith participated in a group hug with the other Vice Lord members.

Plaintiff Rashid Talib was incarcerated for first degree reckless homicide for an incident involving the death of a retail shop owner during a robbery. Talib also has a consecutive 20-year probation term for another robbery. Talib has received approximately 121 conduct reports since he was incarcerated in 1992. Twenty-two of the conduct reports were for major offenses. Talib participated in the 1997 Jackson Correctional Institution riot

as a Vice Lord member. Talib struck at least three officers, all of whom received medical attention for injuries including cuts, swelling and a slight concussion. Talib received two conduct reports for his direct participation in attacking two officers and striking the officers numerous times in the face. He participated in the group hug with other Vice Lords after the riot. Talib received two gang-related conduct reports after the riot, one involving correspondence addressed to the gang leader of the riot.

Plaintiff John Tiggs was sentenced to 112 months for armed robbery. Tiggs has a history of defying staff in front of large groups of inmates and he has threatened to assault or kill staff. In the three and one-half years since he was incarcerated in 1996, Tiggs has received approximately 46 conduct reports, with a majority issued for major violations. In that time, he spent only 240 days in general population. At least eleven conduct reports were for threatening to physically assault or kill prison staff. In 1996, in response to a cell extraction team, Tiggs assumed a boxer's stance and said, "One of your cops would end up dead." The next day during another cell extraction, Tiggs said, "I'm going to have one of you's blood on my hands, and I ain't going to quit until someone's wife will miss him." Tiggs also made other threats, stating, "One of you all is going to the morgue, count on it." On August 3, 1997, Tiggs yelled, "I'll kill you, motherfuckers" as he kicked two officers who were trying to place restraints on him. He was convicted of battery in the Circuit Court for Racine County. On February 5, 1998, Tiggs assaulted another officer by kicking her in the

face as she and other officers tried to move Tiggs to another unit because of his disruptive behavior. During that same incident, Tiggs spat on numerous staff and wrapped several large books in a sheet to use as a weapon. The injured officer had to be treated at an emergency room.

In1996, plaintiff Baron Walker was sentenced for two counts of armed robbery while masked. Walker struck a female bank teller in the head because she was having difficulty opening the cash drawer. This is Walker's second incarceration for armed robbery. During his first incarceration, Walker received approximately 49 conduct reports. Approximately 24 of those conduct reports were for major rule violations. During the time between parole and his present sentence, Walker was charged with domestic battery, intended substantial battery, armed robbery with threat of force and armed robbery while masked. Walker's present conviction resulted in his present incarceration for 60 years. Walker received 10 major conduct reports between July 1996 and May 1997. Walker received a conduct report for inciting a riot in the dining room at Green Bay Correctional Institution in April 1997. While Walker was in the serving line of the dining room, he saw Sergeant Daniel Derocha standing with a pair of binoculars in his hand. Walker shouted up at Sergeant Derocha, "What the fuck is this, binoculars? Well then, if they want to make this a real joint, let's hook this motherfucker up and make it ours. This will be all ours anyway." This was said in front of approximately 50 other inmates. Walker continued to shout to others in the line,

"We should just take it. What they gonna do." Walker also said, "I'm tellin y'all man this motherfucker could all be ours and the police would be in shit." Walker received another conduct report for his behavior and threats at the disciplinary hearing regarding the April 1997 incident. After Walker made threats at the hearing, he had to be physically restrained and removed from the hearing room. Walker has strong ties to the Gangster Disciples gang and could be seen as a leader for the gang by other inmates. After he received the conduct report for inciting a riot, he was referred for transfer by the Green Bay Correctional Institution security director. Soon after Walker arrived at Columbia Correctional Institution, he received a conduct report for group resistance and petitions and inciting a riot.

After receiving numerous juvenile convictions, plaintiff Lamont Moore was waived into adult court and received a life sentence for his conviction in 1993 of first degree intentional homicide. Moore's crime involved shooting a rival gang member and was deemed to have been gang-related. Court transcripts note that Moore associated with the One Way gang, part of the Gangster Disciples gang that is affiliated with the Folk nation. Moore has received approximately 73 conduct reports since 1993. In April 1998, Moore punched a prison recreation leader in the face several times and tried to kick Sgt. Linda Hinickle in the face when Hinickle and the recreation leader tried to separate two other inmates engaged in a fistfight. Moore has received conduct reports for fighting, group

resistance and petitions, writing gang-related letters to another inmate and creating and sustaining a major disruption in the cell hall.

Plaintiff Carlos Austin has received 16 conduct reports since 1995. Most of Austin's five major conduct violations involved Austin verbally challenging staff in front of other inmates in general population. In 1997, while Austin was being placed in temporary lockup after defying staff, he became aggressive, ripped off his shirt, assumed a fighting stance and ran toward staff. Austin attacked an officer, striking him in the face with a closed fist. When a security supervisor came to help, Austin assaulted the captain, striking him numerous times in the mouth and back of the head. During the entire incident, Austin resisted staff physically and threatened them verbally with death. Three staff were injured and two officers were transported to a medical facility for treatment. Austin was charged criminally for the assault.

3. White inmates' offenses

Defendant Endicott was the warden at Columbia Correctional Institution from 1991 until January 2000. During that time, seven white inmates with the following histories were not placed in administrative confinement.

White inmate #1 had at least 150 conduct reports during his incarceration in the Wisconsin prison system. At least six of the conduct reports were for batteries, at least 29

of the conduct reports were for threats, at least two of the conduct reports were for fighting and at least one conduct report was for possessing a weapon. Inmate #1 received 73 conduct reports during his incarceration in Columbia Correctional Institution. Inmate #1 was incarcerated for burglary, battery to a police officer (two counts) and intimidating a witness. Inmate #1 received only 90 days of a 360-day maximum sentence for one of the batteries for which he received a conduct report. The seriousness of the conduct reports was not considered to be significant because of the dispositions the inmate received for them.

White inmate #2 was considered for referral to administrative confinement and placed in temporary lockup for that purpose upon his arrival at Columbia Correctional Institution. The warden decided not to refer inmate #2 to administrative confinement as a result of his conduct over the last several years. Inmate #2 had many drug incidents at Columbia Correctional Institution. Inmate #2 was incarcerated for second degree murder (federal).

White inmate #3 was not found guilty of any conduct reports for battery and received no disciplinary dispositions of more than 90 days.

White inmates #4 and #5 were placed on administrative tracking, indicating that they would be considered for referral to administrative confinement. Because the two inmates continued to misbehave and receive conduct reports, they stayed on program segregation and could not be referred for administrative confinement.

White inmate #6 received a conduct report for battery on November 16, 1998 and received four days' adjustment segregation and 120 days' program segregation for the offense.

White inmate #7 was sentenced to nearly 8 years in program segregation for at least 22 different offenses during his incarceration in the Wisconsin prison system. Inmate #7 was placed in temporary lockup or adjustment segregation. He received at least 63 conduct reports during his incarceration in the Wisconsin prison system. He received three conduct reports for battery (one issued on August 15, 2000, after he was transferred to Racine Correctional Institution). He received at least three conduct reports for battery and received at least nine conduct reports for threats, some of which were received after the filing of the complaint in this case. Inmate #7 may have been placed in program segregation while at Columbia Correctional Institution.

Inmates ## 1, 2, 3, 4, 5, 6, and 7 have never been placed on administrative confinement. Inmates #4 and #5 were placed on administrative tracking but could not be referred for administrative confinement because they did not finish serving their punitive segregation time at Columbia Correctional Institution.

Defendant Endicott does not recall having contact with plaintiffs Dangerfield, Austin, Moore, Walker, Smith, Tiggs, Talid or Brown and he does not recall how long any of these inmates were on administrative confinement. Defendant Endicott does recall having contact

with inmate #3 as he made rounds of the institution. Inmate #3 wrote to Endicott. Defendant Endicott talked to inmate #3 several times because the inmate talked frequently to Endicott while he was on his rounds. Endicott recalls having contact with inmate #7, who talked to him a lot.

B. Cell Conditions

Inmates complaining of a pesticide problem are given "mop-up" containing an insecticide for their cell. If an inmate continues to complain of a problem area, the duty officer will submit a work order. Work orders for insect or rodent problems are given to sanitation officers to be included in the monthly service call by the outside pest control company. Outside contractors apply insecticide inside the buildings at Columbia Correctional Institution. The Department of Corrections staff sprays the outside of the buildings at Columbia Correctional Institution.

The standard issued clothing for inmates in segregation is one pair of blue canvas shoes, one pair of brown socks, one pair of orange pants, one pair of underwear and one orange t-shirt. During the winter months, inmates are given a thermal top and bottom in addition to the standard clothing. If an inmate complains that the cell temperature is cold, staff will usually give the inmate an additional blanket. If the inmate poses a particular security risk, staff cannot issue extra bedding because the inmate may use it to harm himself

or threaten staff safety. If an inmate continues to complain of cold cell temperature, often staff will move the inmate to another cell temporarily. Once an inmate is moved to another cell, staff will prepare a work order so that institution maintenance staff can inspect the cell and repair any problems.

Plaintiff Walker sleeps on the floor at a direct level with the ventilation unit. This caused colds, a runny nose, dry and irritated eyes, back pain and poor blood circulation. During warm months, the cell was infested with ants, spiders and other bugs for which plaintiff Walker received bug poison that was applied on the same floor on which he had to sleep.

On May 11, 1998, plaintiff Walker filed inmate complaint # CCI-1189-98, alleging that there were bugs in his cell, he was double-celled and forced to sleep on the floor. The institution complaint examiner and the institution complaint examiner reviewer, defendant Schneiter, dismissed the complaint. In dismissing the complaint, the institution complaint examiner wrote,

> (1) The [institution complaint examiner] has contacted the regular first shift Sergeant (Kollaszar) who states that neither complainant nor his cellmate have contacted staff to submit a work order for a problem with bugs/spiders in his cell (seven). Thus, the [institution complaint examiner] would recommend that complainant talk to his unit staff about alleged unit problem(s) such as this. (2) All health-related issues should be addressed with [health services unit], if complainant so desires.

Plaintiff Walker did not request corrections complaint examiner review of the complaint.

On September 30, 1998, plaintiff Walker filed inmate complaint # CCI-1998-19068, alleging that there were bugs in his cell and that he was forced to sleep on the floor.

> I'm complaining about . . . sleeping on the floor. If facing the window laying on the floor, the inmate is subjected to laying under another inmate's feet and if laying the opposite direction, the inmate on the floor is laying next to the toilet and the cells air vent which blows 24 hrs daily causes dry skin. The inmate on the floor is subjected to laying amongst trash and dust which usually is found on the sheets of the floor mattress. From time to time I find myself killing small bugs. Mentally this is degrading to force a man to sleep on an floor like an animal or project a future conflict amongst two cellmates. Because what makes one inmate better than the other, that one must sleep on the floor next to where he has to urinate and the other has a bunk. . . .

The institution complaint examiner (defendant Noland) and the institution complaint examiner reviewing authority dismissed the complaint.

> The crowding of all institutions in the Department of Corrections has necessitated the doubling of inmates at [Columbia Correctional Institution] and it has simply become a fact of prison life. Such decisions are not made at the institution level nor are they made lightly. The methods and/or accommodations being used to continue double celled are the best that are available under the circumstances. The [institution complaint examiner] agrees that some of the aspects of the situation are uncomfortable for the complainant. The [institution complaint examiner] would note there are various steps taken prior to doubling inmates and these are not limited to, but can include an evaluation by a screening committee. The [institution complaint examiner] can only say that doubled inmates will be expected to conduct themselves appropriately and patience and understanding are appreciated.

The corrections complaint examiner and defendant Litscher agreed with the institution complaint examiner and dismissed the complaint. Plaintiff Walker's appeal to defendant Litscher included the following allegations:

> My complaint was about having to sleep on the floor on a mattress next to a toilet and a blowing vent at the feet of another s_ly dangerous inmate. This isn't a problem that can't be fixed. . . . I requested for another bed to be added to the upper level cells in order to discontinue this inhumane act of forcing grown men to sleep on the floors. . . . Since being on the floor I find trash on my bedding daily, I keep terrible headaches sleeping under the air of this vent, I can't remain sleep if my cellmate has to urinate because it may splash on me in sprinkles, I'm constantly killing bugs, lower back hurts. . .

OPINION

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial. Celotex v. Catrett, 477 U.S. 317, 322, 324 (1986).

A. Equal Protection Clause

To establish a prima facie case of discrimination under the equal protection clause, plaintiffs must show that: (1) they are members of a protected class; (2) they were similarly situated to members of the unprotected class; (3) they were treated differently from members

of the unprotected class; and (4) defendants acted with discriminatory intent. McNabola v. Chicago Transit Authority, 10 F.3d 501, 513 (7th Cir. 1993). Once a plaintiff makes out a prima facie case of discrimination, the familiar McDonnell Douglas standards kick in and the burden shifts to defendants to articulate a legitimate, non- discriminatory reason for taking the action alleged to be discriminatory. Id. Once defendants meet this burden, the burden shifts back to plaintiffs to demonstrate that the proferred reason is merely a pretext for discrimination. Id.

Although neither side proposed this information as a fact, I will assume for the purpose of deciding this motion for summary judgment that plaintiffs are members of a protected class, specifically, that plaintiffs are not white. I understand plaintiffs to suggest that defendants' failure to keep racial statistics on the inmates in administrative confinement indicates that inmates' placement in administrative confinement was discriminatory. I decline to interpret defendants' failure to keep the statistics that would be most useful to plaintiffs in this case as proof of discrimination. Plaintiffs contend that the racial statistics developed from defendant Douma's list of inmates in administrative confinement indicate an unequal application of a law, policy or system and that they were deprived of their liberty interest in their mandatory release date without due process. However, plaintiffs were not allowed to proceed on a due process claim. Statistics may be useful to rebut defendants' assertion that plaintiffs' placement on administrative tracking and administrative

confinement was not discriminatory or to demonstrate defendants' discriminatory intent. This does not help plaintiffs because they have failed to make out a prima facie case of discrimination by failing to point to any similarly situated white inmate who was treated differently. Plaintiffs have identified seven white inmates to whom they consider themselves similarly situated. Inmates #4 and #5 were placed on administrative tracking and would have been considered for referral to administrative confinement had they not continued to engage in misconduct that kept them in punitive segregation. These inmates are not situated similarly to plaintiffs because plaintiffs completed their punitive segregation time, making them eligible for referral to administrative confinement. In any event, the fact that white inmates #4 and #5 were placed on administrative tracking supports defendants' contention that race was not a criterion for placing inmates on administrative tracking. Plaintiffs have failed to adduce evidence that inmates ## 1, 2, 3, 6 or 7 met the requirements for being placed in administrative confinement. Although the white inmates received conduct reports for major violations, plaintiffs have not adduced evidence suggesting that the violations involved threatening or attacking staff or involvement in riots, as plaintiffs' violations did. Wis. Admin. Code § DOC 308.04 sets forth the guidelines for placing inmates in administrative confinement:

> An inmate may be placed in administrative confinement for any of the following reasons:
> (a) The inmate presents a substantial risk to another person, self, or institution

> security as evidenced by a behavior or a history of homicidal, assaultive or other violent behavior or by an attempt or threat to cause that harm.
> (b) The inmate's presence in the general population poses a substantial risk to another person, self or institution security.
> (c) The inmate's activity gives a staff member reason to believe that the inmate's continued presence in general population will result in a riot or a disturbance.
> (d) The inmate has been identified as having an active affiliation with an inmate gang or street gang or there are reasonable grounds to believe that the inmate has an active affiliation with an inmate gang or street gang; and there is reason to believe that the inmate's continued presence in the general population will result in a riot or a disturbance.

Wis. Admin. Code § DOC 308.04(2). Plaintiffs argue that several of the white inmates listed 1 through 7 even excluding numbers 4 and 5, meet the criteria of § DOC 308.04(2). However, plaintiffs fail to specify any white inmate who met the criteria or explain why they believe the white inmate qualified for administrative confinement. That information is not obvious from the proposed findings of fact. Plaintiffs have adduced evidence showing that at least seven white inmates received conduct reports, some of which were for battery, threats and fighting. This is insufficient to show that any of these white inmates received conduct reports for taking actions against prison staff. Although inmate #1 was incarcerated for battery to a police officer, plaintiffs have not adduced evidence suggesting that inmate #1 battered prison staff or received conduct reports for battery of staff. In contrast, the undisputed facts are that each plaintiff in this case attacked or threatened prison staff. Plaintiffs do not suggest that any of the white inmates were involved in gang activity or leadership. Plaintiffs have failed to meet their burden of adducing evidence about the details

of the misconduct for which the white inmates were sanctioned and have failed to show that the white inmates were situated similarly to plaintiffs. Therefore, defendants' motion for summary judgment on the equal protection claim will be granted.

B. Eighth Amendment

The Eighth Amendment imposes a duty on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997). Prisoners are entitled to "the minimal civilized measure of life's necessities." Id. (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)). To succeed on a conditions of confinement claim, a prisoner must also show that prison officials were deliberately indifferent to his needs. Dixon, 114 F.3d at 644 (citing Wilson v. Seiter, 501 U.S. 294, 301-04 (1991)). Deliberate indifference "'implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'" Dixon, 114 F.3d at 645 (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir.1985)).

Although defendants did not dispute plaintiffs' proposed findings of fact relevant to Walker's Eighth Amendment claim in their response to plaintiffs' proposed findings of fact, they argue in their brief that the facts are not properly before the court because the "written depositions" on which the proposed findings rely were not executed properly. Such

argument should have been made in the response itself; by accepting the fact as undisputed defendants relieve plaintiffs of their burden of proof. Plaintiff Walker has not adduced evidence suggesting that he was subject to extreme cold. He has adduced evidence suggesting that his cell was infested with insects during warm months. However, assuming that the facts proposed by plaintiff Walker are sufficient to show that conditions in his cell were less than the "minimal civilized measure of life's necessities," plaintiff has failed to adduce evidence suggesting that he might be able to prove at trial that defendants were deliberately indifferent to those conditions. To show defendants' deliberate indifference, plaintiff Walker relies on the inmate complaints he filed that were dismissed by various defendants. In the inmate complaints, plaintiff Walker focused on his complaint that he was forced to sleep on the floor while his cellmates had beds. "Standing alone, [plaintiff's] claim that he was damaged because he had to sleep on his mattress on the floor does not state a constitutional violation." Smith v. Gasparini, No. 94-C-50160, 1997 WL 715688, at *3 (N.D. Ill. Nov. 10, 1997). In response to plaintiff Walker's first inmate complaint, the institution complaint examiner suggested that plaintiff talk to his unit staff to submit a work order to help the insect problem and to contact the health services unit; plaintiff has not put in evidence to show that he ever told defendants or any correctional officer about his concerns about the conditions in his cell except through the administrative complaint process. The institution complaint examiner's dismissal of plaintiff Walker's second inmate

complaint indicates that the examiner understood that Walker was protesting the fact that he had a cellmate and was forced to sleep on the floor. The response to plaintiff's grievances does not suggest that defendants had "actual knowledge of impending harm easily preventable," Dixon, 114 F.3d at 645, and made a conscious decision not to remedy the problem of bug infestation. Plaintiff has not alleged that he told defendants about his cell conditions at any time other than in his administrative complaints or asked for additional items for warmth or to rid the cell of insects. In both complaints, plaintiff asked that he receive a bunk bed or a cell to himself. Plaintiff has not adduced evidence suggesting that defendants Verhagan, Douma or Endicott knew about his inmate complaints. Even if all defendants knew about the complaints, the complaints and defendants' response to those complaints are insufficient to support the conclusion that defendants were deliberately indifferent to conditions in plaintiff's cell. Defendants' motion for summary judgment on plaintiff Walker's Eighth Amendment claim will be granted.

ORDER

IT IS ORDERED that the motion of defendants Jon E. Litscher, Richard Schneiter, William Noland, Richard Verhagan, Tim Douma and Jeffrey P. Endicott for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendants and

close this case.

Entered this 16th day of August, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge