IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff,

OPINION and ORDER

v.

02-C-459-C

GEORGE DALEY, Director for the Bureau of Health Services; SHARON ZUNKER, Assistant Director of Bureau of Health Services; MARC CLEMENTS, Security Director at Waupun Correctional Institution; BETH DITTMANN, Health Services Unit (H.S.U.) Supervisor at Waupun Correctional Institution; PAM BARTELS, H.S.U. Administrator at Wisconsin Secure Program Facility; PAULINO BELGADO, Waupun Correctional Institution Physician; GERT HASSELHOFF, Wisconsin Secure Program Facility Physician; STEVEN HOUSER, captain at Waupun Correctional Institution; WILLIAM SCHULTZ, Financial Specialist 2 at Waupun Correctional Institution; KEN LANGE, Registered Nurse at Wisconsin Secure Program Facility; JEFFREY FRIDAY, Officer 2 at Waupun Correctional Institution; and ROBERT BURNS, sergeant at Waupun Correctional Institution.,

Defendants.

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This is a civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Nathaniel Allen Lindell is a Wisconsin prisoner presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. During the time

relevant to this case, plaintiff resided at Waupun Correctional Institution and the following defendants worked there: 1) Marc Clements, security director; 2) Beth Dittmann, manager of the health services unit; 3) Paulino Belgado, physician; 4) Steven Houser, captain; 5) William Schultz, financial specialist; 6) Jeffrey Friday, officer; and 7) Robert Burns, sergeant. During all relevant times, the following defendants worked at the Wisconsin Secure Program Facility: 1) Pam Bartels, an employee of Prison Health Services, Inc., health services administrator; 2) Gert Hasselhoff, an employee of Prison Health Services, Inc., medical director; and 3) Ken Lange, a Prison Health Services employee, registered nurse. Finally, at all relevant times, defendant George Daley served as medical director for the Bureau of Health Services within the Wisconsin Department of Corrections and defendant Sharon Zunker was the director of the Bureau of Health Services within the Department of Corrections.

Remaining to be resolved in this case are plaintiff's claims

- against defendant Burns in which plaintiff alleges that Burns was deliberately indifferent to his safety when he assigned plaintiff to cell J-27;
- against defendants Zunker, Belgado, Dittmann, Daley, Hasselhoff, and Bartels in which plaintiff alleges that these defendants were deliberately indifferent to his serious medical needs when they failed to treat his nose after he had been in a fight with his cellmate;

- against defendant Lange, who plaintiff alleges was deliberately indifferent to his serious medical needs by giving plaintiff laxatives rather than pain medication;
- against defendants Friday, Clements, Houser and Schultz, in which plaintiff alleges these defendants retaliated against plaintiff for exercising his First Amendment right to file inmate grievances; and
- against defendants Schultz and Houser, who are alleged to have retaliated against plaintiff for exercising his First Amendment right to obtain white nationalist literature.

Jurisdiction is present under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) and (4).

Presently before this court are the parties' cross motions for summary judgment. I conclude that because plaintiff has offered no evidence to show that defendant Burns knew that plaintiff was in imminent danger of a serious attack by his cellmate, defendants are entitled to summary judgment on plaintiff's claim against Burns. In addition, I find that plaintiff failed to submit evidence from which a jury could reasonably find that, in responding to plaintiff's nose injury, defendants Daley, Zunker, Dittmann, Delgado, Bartels and Hasselhoff took any medically inappropriate acts or based their actions upon anything other than sound medical judgment and that these defendants are entitled to summary judgment. I conclude as well that defendant Lange responded to plaintiff's documented medical needs when he gave plaintiff laxatives and pain medication and that defendants'

motion for summary judgment on this claim should be granted. Finally, I conclude that a reasonable jury could find that defendants Friday, Houser and Schultz would have acted differently toward plaintiff had plaintiff not filed or threatened to file complaints about his broken nose and about the alleged failure to protect him from an assault by his cell mate. However, plaintiff has not shown that he is entitled to judgment in his favor on this claim, as a matter of law. Therefore, I will deny both sides' motions for summary judgment as to the claim that defendants Friday, Houser and Schultz retaliated against plaintiff when they issued him conduct report no. 1199246-1603 and found him guilty of attempted battery.

I will grant defendants' motion for summary judgment on plaintiff's retaliation claim as it relates to defendant Clements because plaintiff has not adduced any evidence that defendant Clements knew of defendant Friday's alleged improper motivation for writing conduct report no. 1199246-1603. Moreover, I conclude that because none of the defendants were on the program review committee that decided to transfer plaintiff to the Wisconsin Secure Program Facility, they are entitled to summary judgment with respect to plaintiff's claim that defendants transferred him in retaliation for his exercise of his First Amendment rights.

Finally, plaintiff states that he no longer wishes to pursue his claim that defendants Houser and Schultz retaliated against him for trying to obtain white nationalist literature when they issued him conduct report no. 1069010-674. Plt.'s Br., dkt. #86, at 3.

Therefore, I will enter summary judgment for defendants Houser and Schultz on this claim.

From the proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Disciplinary Conduct

Plaintiff Nathaniel Allen Lindell is a Wisconsin prisoner serving a life sentence and presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Prior to his transfer on February 28, 2001, plaintiff was confined at the Waupun Correctional Institution in Waupun, Wisconsin.

Plaintiff's pre-sentence investigation report for case 97-CF-140 is part of plaintiff's prison files. It contains a notation that plaintiff was involved in race-based fights in jail. On March 1, 1999, plaintiff was accused of fighting with a black prisoner, who claimed to be a member of the "Gangster Disciples," a gang whose primary members are not white.

Almost two months later, on April 24, 1999, plaintiff was involved in a fist fight with his cell mate, inmate Delarosa. Delarosa had tattoos reflecting his membership in the "Gangster Disciples." Plaintiff was issued conduct report no. 1069010-674. On May 11, 1999, defendants Houser and Schultz, members of the adjustment committee, held a disciplinary hearing on the conduct report and found plaintiff guilty of two offenses: 1)

disobeying orders, contrary to DOC § 303.24; and 2) fighting, contrary to DOC §303.17. In finding plaintiff guilty of these charges, Houser and Schultz wrote:

> We find the reporting staff credible. The inmate did not present any evidence to contradict the C/R except to state that he was the one injured.
>
> After a review of the C/R the evidence and the testimony we find the inmate intentionally was involved in a fight by striking another inmate [deletion] SH in the face with closed fists. We also find the inmate intentionally disobeyed an order to stop fighting when told to by staff.

Plaintiff received 8 days' adjustment segregation and 180 days' program segregation as a penalty. Plaintiff appealed the decision to no avail.

On May 1, 1999, plaintiff filed an inmate complaint about being placed in a cell with Delarosa, about the fight that ensued, and about his discipline. His complaint was rejected and dismissed.

On December 8, 2000, plaintiff was assigned to the northwest cell hall after serving time in the segregation unit. In a telephone conversation with the segregation unit, defendant Robert Burns said that there was an open bed in cell J-27 of the northwest cell hall. The segregation unit gave plaintiff a transfer form to present to Burns, showing plaintiff's cell assignment as J-27, and showing no restrictions as to where or with whom plaintiff could be celled. At Waupun, inmates are double-celled by seniority, with an inmate's seniority date set at either his date of entry into Waupun or the last date of his release from program segregation, whichever is later. An inmate released from segregation

to general population is likely to be randomly assigned on a unit like the northwest cell hall to a double cell on the basis of bed space, unless there is a verified medical, mental health or security reason for the inmate to be single-celled. Waupun Correctional Institution offers a voluntary confinement single cell option to inmates who have a justifiable security concern.

After looking at the transfer form, defendant Burns ordered plaintiff to take his property to cell J-27 and reside in that cell. When plaintiff discovered he was assigned to a double cell, plaintiff asked Burns to talk to Waupun mental health care staff member George Kaemmerer about his ability to handle a double cell. Plaintiff had previously sought a single-cell restriction as a result of alleged psychological problems. After Burns learned from Kaemmerer that the mental health staff had not ruled out double-celling for plaintiff, he told plaintiff to proceed to cell J-27. Burns did not set policies at Waupun correctional institution concerning double celling and he did not set security policies in general.

Plaintiff went to cell J-27 and then returned to the sergeant's desk, announcing to Burns that he refused to be housed in that cell because inmate Jenkins, the other occupant, was black, a smoker and had visible Gangster Disciple tattoos.

Plaintiff returned to cell J-27. A short time later, a fight broke out between plaintiff and Jenkins, resulting in serious injuries to plaintiff, including a torn out thumbnail, an abrasion on the upper left side of his nose, abrasions and bruises on his back and thighs and a black left eye.

At the time of the incident, defendant Jeffrey Friday was assigned to northwest cell hall. He issued conduct report no. 1199246-1603 to plaintiff, charging him with violating DOC § 303.17 (fighting), DOC § 303.28 (disruptive conduct), and DOC § 303.12 (battery). The incident description of the conduct report reads as follows:

> On the above date and time, I, Officer Friday, was working Northwest Support when Inmate Madden #388289 J-range tier tender, reported to me that there was an argument in J-27. When arriving at cell J-27 I observed Inmate Lindell with his left hand holding Inmate Jenkins shirt, and his right arm was cocked back with his fist clinched. A 10-10 was called. When Lindell saw me he put his right arm down and let go of Jenkins shirt. Lindell then said "Man I told you this was going to happen. Get me out of this cell." I observed blood coming from Lindell's right thumb. Lindell was ordered to the front of the cell and was cleaned up and Inmate Lindell's thumbnail was found on the cell floor. Inmate Lindell told Capt. Core that he hit Jenkins in the eye with his elbow and that he also hit him with a fist.

Friday removed plaintiff from the cell after the fight. Other than issuing the conduct report, Friday did not participate in the disposition of charges on conduct report no. 1199246-1603. On December 11, 2000, defendant Marc Clements approved conduct report no. 1199246-1603 for further processing under the disciplinary code. He labeled the conduct report a major conduct report and did not strike any of the alleged rule violations. Although he had the authority to dismiss Friday's conduct report, dismiss some of the alleged charges or make it a minor conduct report, it was up to the disciplinary committee to determine whether plaintiff was guilty of one or more of the offenses charged.

Defendants Houser and Schultz, disciplinary committee members, held a disciplinary

hearing on January 9, 2001. Plaintiff appeared at the hearing, heard the reading of the conduct report and made an oral statement that Houser recorded as follows: "Plead not guilty he had a life bit. He would have been injured if I would of hit him in the eye. He bit my thumb." Plaintiff presented written arguments and other evidence. Defendants noted at the hearing that there was no injury to Jenkins and that plaintiff's medical records did not support a finding that his nose was broken as a result of the altercation.

The adjustment committee found plaintiff guilty of attempted battery contrary to DOC § 303.12. In finding plaintiff guilty of this offense, defendants Houser and Schultz wrote:

> We note that the inmate waived the 21-day time limit. We find the reporting staff credible. We note that the inmate wrote that he was defending himself. We note that the reporting staff wrote that the inmate was observed holding the other inmate's shirt with left hand while having his right arm cocked back with his fist clinched. We also note that the reporting staff wrote that the inmate stated, "I told you this was going to happen." We find this statement shows pre-meditation. We also note that the inmate was found guilty of fighting 3-11-99, and 5-11-99. We do not find the inmate credible.
>
> After a review of the conduct report, the evidence, and all of the testimony, we find the inmate intentionally attempted to batter his roommate by grabbing his roommate by the shirt and cocking back his arm with his fist clinched. We note that staff intervened at this time.

Houser and Schultz gave plaintiff 8 days' adjustment segregation and 360 days' program segregation. They gave Jenkins 180 days' segregation.

Plaintiff appealed the disciplinary decision to the warden on January 21, 2001; it was affirmed on February 26, 2001. Plaintiff then filed two inmate complaints about the decision, both of which were dismissed. Plaintiff filed inmate complaints on December 13, 2000, and December 19, 2000, about being celled with Jenkins and about his resulting injuries. Both of these complaints were dismissed. Plaintiff then filed case no. 01-CV-1757, State ex rel. Nathaniel A. Lindell v. Jon F. Litscher, in Dane County Circuit Court, seeking review of the disciplinary action associated with conduct report no. 1199246-1603 and his subsequent transfer to the Wisconsin Secure Program Facility. Judge Moria Krueger reversed and vacated Houser and Schultz's January 9, 2001 decision and ordered the findings and penalty expunged from plaintiff's correctional record, after finding that the adjustment committee had ignored significant facts presented by plaintiff during the disciplinary hearing.

Defendants Friday, Clements, Schultz and Houser were not on the program review committee that made the decision to transfer plaintiff out of the Waupun Correctional Institution on February 28, 2001 to the Wisconsin Secure Program Facility.

B. Medical Care

After the fight on December 8, 2000, plaintiff suffered extreme fear, paranoia, suicidal thoughts and acute anxiety. Defendant Paulino Belgado, a Wisconsin-licensed physician,

examined plaintiff following the December 8 fight and noted in plaintiff's progress notes:

> Subjective - Bleeding base on nail bed of R Thumb, sore nose with slight abrasion on it. Claims someone punched his nose and bit off the nail of the R thumb few minutes ago.
>
> Objective - Escorted by white shirts, officers (2) AND 2-3 other officers to the tx room. Pt is conscious and alert, cuffed behind him with back and oozing R thumb nail bed. Nose - n1. Breathing - able to inhale through both nostrils. X-ray of the nose - with linear undisplaced fx with same alignment as before x-ray in "98."
>
> Assessment - Avulsion - nail of R thumb, undisplaced fxd nasal bone.
>
> Plan - Wound washed with antiseptic. Occlusive dressing. X-ray of the nose. See P.O. Last TD 96. Dr. Belgado.

Belgado ordered an x-ray, which he considered the proper diagnostic tool to ascertain the extent of any damage to plaintiff's nose. He washed and dressed plaintiff's wound, prescribed a seven-day prescription of 500 mg of Augmentin (an antibiotic) and a ten-day prescription of 600 mg Ibuprofen, as needed to alleviate pain. Belgado referred plaintiff's x-rays to a radiologist for a reading. After reviewing the radiologist's report, Belgado informed plaintiff on December 15, 2000, that he did not have a fracture in his nose at that time. The charting nurse noted that "Inmate can't accept this fact and threatened lawsuit."

Belgado saw plaintiff again on December 20, 2000. At that time, plaintiff complained of severe pain. Belgado wrote in his progress notes in relevant part that 1) plaintiff still insisted that his nose was broken; 2) his nose was unchanged since 1998; 3) plaintiff had no

nasal breathing difficulty; and 4) Belgado had reassured plaintiff as to his nasal condition. Belgado examined plaintiff again on January 3, 2001, writing in his progress notes that plaintiff still complained that his nose caved in, but that plaintiff's nose was unchanged and that there were no breathing difficulties, and that plaintiff's request for nasal cosmetic surgery was denied. Belgado saw plaintiff on February 14, 2001, and wrote in his progress notes that 1) plaintiff complained of an asthma attack when he did a lot of breathing exercises; 2) plaintiff was alert, eupneic (breathing freely), not pale, his weight was 180 pounds and his height was six feet, three inches; and 3) Belgado did not detect a murmur and plaintiff's lungs were equal in expansion, resonant and without rales.

On December 13, 2000, plaintiff filed inmate complaint no. WCI 2000-35835, complaining about Belgado's refusal to treat his nose. On December 19, 2000, plaintiff sent a request slip to the complaint examiner, complaining that defendant Beth Dittmann had been ignoring his complaints that Belgado was refusing to set his broken nose, and explaining that his nasal bones were broken so that their jagged edges cut, causing him to experience constant pain. Dittmann is not a licensed physician. Dittmann examined the health services unit's progress notes, physician's orders and a radiology report for plaintiff during the period of December 8, 2000, until his transfer from Waupun on February 28, 2001.

Defendant Sharon Zunker, a licensed registered nurse, dismissed plaintiff's complaint

WCI-2000-35835 on December 26, 2000. Plaintiff appealed Zunker's decision without success. Defendant Zunker reviewed and dismissed several other complaints by plaintiff concerning the treatment of his nose. These complaints included nos. WCI-2001-738, SMCI-2001-24317, and SMCI-2001-29030. Zunker also addressed plaintiff's December 18, 2001 letter by asking prison health services staff at the Wisconsin Secure Program Facility to respond in writing to plaintiff's concerns about the inadequate care of his nose. The prison health services staff responded to plaintiff as follows:

> Ms. Zunker has forwarded your letters regarding your weight loss and broken nose. This issue has been discussed with the physician and he has met with you to discuss this. I assure you the health services staff are aware of your medical needs and need your cooperation to provide safe and efficient medical care. Health care is being rendered appropriately. If you have any specific questions regarding your treatment please speak with the doctor.

After reviewing plaintiff's complaints at the Wisconsin Secure Program Facility, Zunker concluded that the prison health services staff was dealing with plaintiff's nose in an appropriate manner and was not neglecting him. Also, defendant Zunker was aware that plaintiff had continuing access to medical care at the Wisconsin Secure Program Facility. Zunker had no reason to believe that either the Waupun health services staff or the prison health services staff at the Wisconsin Secure Program Facility was not providing appropriate medical care for plaintiff.

On March 2, 2001, plaintiff was seen by Dr. Riley at the Wisconsin Secure Program

Facility. Plaintiff asked for an evaluation of his condition by an ear, nose and throat specialist. Riley prescribed 800 mg of Ibuprofen, as needed, for nose and facial pain and ordered an x-ray. The x-ray was taken on March 21, 2001 and indicated "no fracture or other abnormality." On April 2, 2001, plaintiff saw Riley again about his facial and nose pain and breathing problems. Plaintiff threatened to sue Riley to get a proper exam and treatment. Plaintiff saw an ear, nose and throat specialist on April 19, 2001, who categorized plaintiff's condition as "Class IIIB," which means "non-urgent." Class IIIA conditions are defined as:

> Those involving persistent pain and experiencing serious discomfort or rapidly progressive disease or impairment, or where severity of pain has been progressive. The condition must be subject to surgical or medical correction or arrest. While no ill effects will result from a delay of several weeks or months, adequate care dictates the performance of medical or surgical procedures as soon as scheduling will reasonably permit. Examples include symptomatic ulcerated varicosities, non-incarcerated symptomatic hernias, large hemorrhoids, and painful bunions.

Class IIIB conditions are defined as:

> Those not including persistent pain, rapidly progressive disease or impairment and not solely for the convenience of the patient. No medical effects will result from surgical delay of months or years. This is the sort of procedure which a non-institutionalized or uninsured person might choose to delay until he/she becomes medically insured. Examples include asymptomatic hernias for sedentary patients, benign noninflammatory cysts, orthopedic problems where there is no persistent pain or inflammation, minor nasal reconstruction, non-cancerous skin lesions and cases manageable with non-narcotics.

The specialist recommended a surgical repair of plaintiff's nose to widen and straighten the nasal passages.

Plaintiff was next examined on May 5, 2001, by defendant Gert Hasselhoff, who is not an ear, nose and throat specialist. Hasselhoff noted that an x-ray from October 1998 revealed that plaintiff's nose was deviated to the left. He did not authorize plaintiff for surgery at that time.

On August 19, 2001, plaintiff filed a complaint in which he sought authorization for the nose surgery recommended by the ear, nose and throat specialist. On September 4, 2001, the examiner recommended that the complaint be dismissed. Zunker dismissed the complaint on September 8, 2001. Plaintiff appealed the dismissal, but to no avail.

On September 20, 2001, defendant Hasselhoff submitted an outpatient referral on plaintiff's behalf, indicating that plaintiff was requesting nose surgery. On September 30, 2001, plaintiff filed a complaint, seeking to get a copy of Hasselhoff's referral for the nose surgery. Defendant Pam Bartels reported to the complaint examiner that the health services unit had never received any request from plaintiff for the nose surgery. Zunker dismissed the complaint on November 4, 2001. Plaintiff's appeal of the dismissal was dismissed also.

If Department of Corrections physician-employees believed that class III medical procedures or surgery was necessary, they submitted requests to defendant George Daley. Daley did not receive any physician's request for an outside specialist evaluation of plaintiff's

nose or any physician's request for a Class III procedure or surgery concerning plaintiff's nose. Daley did not approve Class III surgeries or procedures without a physician's request. He did not supervise prison health service physicians and did not examine inmates personally.

On November 2, 2001, defendant Ken Lange gave plaintiff Tylenol at 4:00 p.m. and again at 8:00 p.m. Lange also gave plaintiff Docusate for the treatment of constipation. However, Lange did not document this in plaintiff's medical records for that date. Plaintiff's medication administration records from November 2, 2001, indicate that he was given a number of medications that day, including Tylenol and Ibuprofen. A November 5, 2001, entry in plaintiff's medical progress notes indicates plaintiff's desire to renew a fiber prescription because of constipation and a long-term use of fiber by plaintiff for constipation. On November 3, 2001, plaintiff filed a complaint about Lange's having given him laxatives instead of pain pills and about the ongoing refusal to treat his facial pain.

DISPUTED FACTS

The parties dispute several important facts. First, the parties dispute whether, after plaintiff discovered Jenkins was his cellmate, he informed Burns of prior conflicts he had had with blacks and Gangster Disciple members in and out of his cell. They also dispute whether Burns had previously honored a request from plaintiff not to be placed in a cell with a black

inmate and that before Burns ordered plaintiff to share a cell with Jenkins, Burns offered to give plaintiff a large, heavy stapler. Plaintiff alleges that Burns offered him the stapler, admitted that Jenkins did not like whites and "ran off with his last cellie" and told plaintiff, "we all know you'll handle him for us and hate his kind." Plaintiff alleges that he told Burns, "I don't need this trouble, I just got out of seg," to which Burns replied, "Look, you won't get in trouble, just deal with him for us." The parties dispute whether defendant Burns offered plaintiff protective custody or "voluntary confinement" as an option when he assigned plaintiff to cell J-27.

Second, plaintiff alleges that in response to plaintiff's threats to sue him for allowing him to be celled with Jenkins, defendant Friday stated, "If you quit complaining we might not find you guilty of battery and let you out of seg." Defendants deny that Friday made this statement and they deny that when plaintiff repeated his intention to complain, Friday replied, "Then you're going to stay in seg for a long time and go to Supermax — it's your choice."

The parties dispute whether, during the disciplinary hearing for conduct report no. 1199246-1603, plaintiff heard defendants Houser and Schultz talking with Linda Alsum O'Donovan, plaintiff's staff advocate, about his recent complaints concerning inadequate treatment of his broken nose and failure to protect him. (Plaintiff also argues that Houser and Schultz discussed plaintiff's complaints about the denial of racist literature. Because I

did not allow plaintiff leave to proceed on that issue in the context of conduct report no. 1199246-1603 and because plaintiff has abandoned his claim on that issue in the context of conduct report no. 1069010-674, I have disregarded any facts plaintiff proposed about racist literature as being a motivating factor for the finding of guilt.) The parties dispute whether Alsum O'Donovan told Houser and Schultz to find plaintiff guilty of something so that "it will be grounds to stop his suit over being put in danger and hurt" and whether Alsum O'Donovan said, "Don't write his nose was broke, he's filed complaints on that too and we aren't going to spend any money for surgery on that," to which Houser or Schultz replied, "We'll find him guilty of battery attempt, it doesn't require much evidence, then we'll have the warden recommend he go to Supermax, he'll be kept busy up there, won't have time to sue anyone over this."

As to the laxative incident, the parties dispute whether plaintiff asked Lange to give him laxatives on November 2.

OPINION

A. Eighth Amendment Claims

1. Cell assignment

The failure of prison officials to protect an inmate from an assault by another inmate may violate the Eighth Amendment if the officials acted with reckless disregard or with

deliberate indifference to the prisoner's safety. Farmer v. Brennan, 511 U.S. 825, 833 (1994); Jelinek v. Greer, 90 F.3d 242, 244 (7th Cir. 1996). Deliberate indifference to the risk of attacks from other inmates may be proved in one of two ways.

First, a prisoner may prove that prison officials acted with deliberate indifference by demonstrating the existence of "a pervasive risk of harm" to inmates from other prisoners and a failure by prison officials to respond reasonably to that risk. Goka v. Bobbitt, 862 F.2d 646, 651 (7th Cir. 1988). A "pervasive risk of harm" refers to situations in which violence is commonplace and that assaults occur with sufficient frequency to put prisoners in reasonable fear for their safety and to make prison officials aware of the existence of the problem and the need for protective measures. Matzker v. Herr, 748 F.2d 1142, 1149 (7th Cir. 1984). The assaults may be random or they may be directed toward an identifiable group of prisoners of which the inmate is a member. Walsh v. Mellas, 837 F.2d 789, 797 (7th Cir. 1988). In order to prove liability, the inmate must establish that prison officials were not merely negligent in failing to foresee a danger to plaintiff but that they actually knew of it. Mere negligence does not violate the Eighth Amendment, which prohibits cruel and unusual *punishment*. "Punishment" implies actual knowledge of the risk of harm, so that a conscious refusal to prevent the harm can be inferred from the defendant's actions or inaction. Id. at 795.

Second, a prisoner plaintiff may establish that officials acted with deliberate

indifference by demonstrating that a prison official knew of a strong likelihood that a specific prisoner would be assaulted and failed to take any steps to protect the prisoner. Farmer, 511 U.S. at 837-38. The prison official must both be aware of facts from which he could infer that a substantial risk of serious harm exists and must draw the inference. Id.; Pavlick v. Mifflin, 90 F.3d 205, 208 (7th Cir. 1996). The plaintiff need not show that the prison official acted or failed to act believing that harm actually would occur; he has to show only that the official acted or failed to act despite knowing there was a substantial risk of harm. Farmer, 511 U.S. at 842; Pavlick, 90 F.3d at 208. In order to establish a basis for liability, the prisoner must tell corrections officers who is threatening him, so as to allow them a reasonable opportunity to protect him from harm. Matzker, 748 F.2d at 1150.

In moving for summary judgment, plaintiff has the burden showing that being housed with Jenkins presented an imminent threat to his health and safety and that Burns was aware of that threat and disregarded it. Even if I accept as true plaintiff's allegations concerning Burns offering plaintiff a stapler and acknowledging that plaintiff could "handl[e] [Jenkins] for us," plaintiff has failed to show that sharing a cell with Jenkins presented an immediate threat to *his* safety and that Burns was aware of that threat. In cases alleging a failure to protect, "a prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a *specific* threat to his safety." Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996) (emphasis added). It is true that courts may "infer 'deliberate

indifference to a known hazard' where prison officials fail to protect an inmate who belongs to an identifiable group of prisoners for whom the risk of assault is a serious problem of substantial dimensions, including prisoners targeted by gangs." Lewis v. Richards, 107 F.3d 549, 553 (7th Cir. 1997); see also James v. Milwaukee County, 956 F.2d 696, 700 (7th Cir. 1992) (stating "deliberate indifference" means "*recklessness* in a criminal, subjective sense: disregarding a risk of danger so substantial that knowledge of the danger can be inferred").

In this case, however, plaintiff has offered no evidence that Jenkins posed a "real and significant" threat. Langston v. Peters, 100 F.3d 1235, 1239 (7th Cir. 1996). It is undisputed that plaintiff did not get along with non-white inmates and that he had been in two previous fights with inmates claiming to be members of the Gangster Disciples. This does not mean he is entitled to be celled with white inmates only. As I noted in the order entered December 4, 2002, plaintiff does not have a constitutional right to share a cell with a white cell mate. Dec. 4, 2002 order, dkt. #2, at 14. To the extent that plaintiff believes he should not have been paired with Jenkins because of Jenkins's race, he has no Eighth Amendment claim. Also, to the extent that plaintiff objects to being placed in a cell with anyone, he has no Eighth Amendment claim. By itself, double-celling is not cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (housing two inmates in single cell at Southern Ohio Correctional Facility was not cruel and unusual).

Plaintiff fails to present any evidence that he was a target to Jenkins or the Gangster Disciples generally and that Burns was aware of that situation. See, e.g., Walsh, 837 F.2d at 798 (finding that clear indications of inmate's gang-related activities and documented threats to Walsh from gang members contained in Walsh's personnel file was enough to make defendants aware of danger to Walsh from gang members); see also Case v. Ahitow, 301 F.3d 605, 606 (7th Cir. 2002) (finding prison officials deliberately indifferent to plaintiff's safety when they assigned particular inmate, unsupervised, to same unit as plaintiff, who had been classified by prison psychologist as "vulnerable victim," who had received repeated threats from that particular inmate and who had written head of prison system about threats from inmate). Plaintiff was not in protective custody at Waupun and his transfer form showed no restrictions on where or with whom he could be double-celled.

Even if Burns did not offer plaintiff protective custody status before placing him in the cell with Jenkins, more than 18 months had passed since plaintiff's altercation with Delarosa. Plaintiff has not proposed any facts to show that he felt threatened by Gangster Disciples after the altercation and made that fact known to prison authorities. The passage of time between fights as well as the absence of evidence describing specific threats is significant. In Lewis v. Richards, 107 F.3d at 553-54, the Court of Appeals for the Seventh Circuit found no apparent risk when five months had passed between an inmate's sexual assault by members of the Gangster Disciples, leaving no indication that the plaintiff was in

immediate danger. In that case, the plaintiff had sought protective custody after two rapes and confrontation with about 20 gang members who had threatened him with physical harm if he told anyone else about the first attack. Lewis, 107 F.3d, at 554. The court found it significant that before the second attack, Lewis failed to inform prison officials that gang members had made threats against him, thus preventing the officials from knowing that he was in "heightened peril." Id.

Even if Burns were aware of plaintiff's prior conflicts with blacks and Gangster Disciples, enough time had passed without incident that Burns could reasonably have assumed that plaintiff did not face an imminent risk of harm. Therefore, it was reasonable for Burns to follow the prison's double-celling policy and the information on plaintiff's transfer form. See Farmer, 511 U.S. at 845 ("[P]rison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause").

It is common knowledge that "prisoners are dangerous" and "some level of brutality and sexual aggression among them is inevitable no matter what the guards do." McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991). Despite this, prisons are not under a duty to separate inmates by gang affiliation and thus effectively by race. Mayoral, 245 F.3d at 939 (noting that it would only be matter of time before lawsuit would be filed if such separation occurred). Because plaintiff has failed to adduce evidence to show that Jenkins or any Gangster Disciple threatened him and because the undisputed facts reveal that more

than 18 months had passed since plaintiff's last altercation with a Gangster Disciple and that plaintiff's transfer document had no cell restrictions, I conclude that no reasonable jury could find that defendant Burns was deliberately indifferent to plaintiff's safety when he placed plaintiff in a cell with Jenkins. Defendants' motion for summary judgment will be granted on this claim.

2. Broken nose

The Eighth Amendment requires the government "to provide medical care for those whom it is punishing by incarceration." Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). This does not mean that prisoners are entitled to whatever medical treatment they desire. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care only when they are deliberately indifferent to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). To show deliberate indifference, a plaintiff must establish that the official was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). Inadvertent error, negligence, ordinary malpractice or even gross negligence does not constitute deliberate indifference. Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515 (7th Cir. 2002); see also Snipes, 95 F.3d at 590-91.

Courts should recognize that inmates have serious medical needs if they are suffering from medical conditions generally considered as life-threatening or as carrying risks of permanent, serious impairment if left untreated. Even if inmates are not facing death or permanent harm, prison officials have an obligation to provide medical treatment to inmates suffering such significant pain that denial of assistance would be "uncivilized." Id.; but see Snipes, 95 F.3d at 592 (Eighth Amendment does not require prison doctors to keep inmate pain-free in aftermath of proper medical treatment).

Plaintiff contends that defendants Zunker, Delgado, Daley, Dittmann, Hasselhoff and Bartels were deliberately indifferent to his serious medical needs when they failed to treat his broken nose after the December 8, 2000 fight. It is undisputed that Belgado told plaintiff that his nose was not broken and that he did so only after ordering an x-ray of plaintiff's nose, having the x-ray read by a radiologist, determining that the alignment of plaintiff's nose was the same on December 8, 2000 as it had been in an x-ray taken in 1998, and finding that plaintiff did not demonstrate any breathing difficulty.

Plaintiff suggests that he has proven that his nose required surgery by showing that an ear, nose and throat specialist had recommended surgical repair to widen and straighten his nasal passages. However, this recommendation does not show that the defendants were deliberately indifferent to his medical needs when they failed to provide the surgery. Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996) (difference of opinion about

type of care provided does not constitute deliberate indifference). Although plaintiff cites the specialist's recommendation, he concedes that the specialist classified plaintiff's injury as class IIIB or "non-urgent," which means it does not require *immediate* surgery.

Not willing to accept the specialist's classification, plaintiff argues that the continuous prescription of Ibuprofen for pain is indicative of a class IIIA condition, rather than a class IIIB and proves that defendants should have provided him with the requested nose surgery. This argument is unconvincing. Nowhere in the definition of class IIIB conditions does it state that such conditions do not cause pain. To the contrary, Class IIIB conditions includes those that are manageable with non-narcotics, such as Ibuprofen. Plaintiff received Ibuprofen for his facial pain and cites no evidence that it did not lessen his pain.

The undisputed facts show that defendants responded to plaintiff's medical needs. Plaintiff saw defendants Belgado, Riley, and Hasselhoff and the ear, nose and throat specialist. Defendant Belgado examined plaintiff on four different occasions, dressed his thumb wound, prescribed pain medication and referred plaintiff's x-ray to a radiologist. Defendant Riley ordered an x-ray and detected "no fracture or abnormality" in plaintiff's nose and prescribed Ibuprofen for his facial and nose pain. After plaintiff complained about not getting authorization for nose surgery, defendant Hasselhoff even submitted an outpatient referral indicating the plaintiff wanted nose surgery. Defendant Zunker asked the Wisconsin Secure Program Facility staff to respond in writing to plaintiff's concerns about

the inadequate care of his nose, which they did. Given all these responses, no reasonable jury could find that defendants completely ignored plaintiff's medical needs. Plaintiff's disagreement with the medical judgments of the defendants is not enough to state an Eighth Amendment claim of medical mistreatment. See, e.g., Walsh, 837 F.2d at 794 ("[A] prison doctor's failure to order an X ray of plaintiff's lower back did not violate the Eighth Amendment even though it might have amounted to an act of medical malpractice.") (citing Estelle, 429 U.S. at 107).

Plaintiff has not shown that defendant Daley exhibited deliberate indifference to a serious medical need. It is undisputed that defendant Daley did not receive any physician's request for a class III procedure or surgery concerning plaintiff's nose. Without such a request, Daley had no obligation to approve class III surgery just because plaintiff wanted it, particularly when various medical professionals have agreed that plaintiff's nose does not present an urgent need for surgery. By following the lead of Daley and plaintiff's treating providers, defendants Zunker, Dittmann and Bartels were not deliberately indifferent to plaintiff's medical needs in denying plaintiff's request for surgery.

Plaintiff's desire for nose surgery does not arise to a constitutional entitlement. A jury may infer deliberate indifference from a medical professional's erroneous treatment decision "only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible

did not base the decision on such a judgment." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996). Plaintiff has submitted no evidence, expert or otherwise, from which a jury could find that defendants' choices regarding the treatment of plaintiff's nose and associated pain were medically inappropriate or based upon something other than sound medical judgment. Accordingly, defendants' motion for summary judgment on this claim will be granted.

3. Laxatives

Plaintiff cannot show that defendant Lange was deliberately indifferent to his serious medical needs when he gave plaintiff laxatives on November 2, 2001. Although plaintiff alleges that defendant Lange gave him laxatives in place of medication to treat plaintiff's facial pain, the undisputed facts reveal that Lange gave plaintiff Tylenol twice on November 2, 2001, and the medication administration records show that plaintiff received Tylenol and Ibuprofen on that day. Whether Lange gave plaintiff laxatives on November 2 is irrelevant; the relevant fact is that plaintiff received medication to alleviate his pain that day. I conclude that defendant Lange did not know of and disregard an excessive risk to plaintiff's health when he gave plaintiff a laxative on November 2 and that Lange's action did not inflict needless pain and suffering on plaintiff. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997) (holding that "serious medical needs" encompass not only conditions that

are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which deliberately indifferent withholding of medical care results in needless pain and suffering). Defendants' motion for summary judgment will be granted as to plaintiff's claim against Lange for deliberate indifference to a serious medical need.

B. Retaliation Claim

Plaintiff raised two retaliation claims in his complaint. He alleged that he had received harsher discipline for fighting than his cellmate, who initiated the fight, and that he had been transferred to the Wisconsin Secure Program Facility and that both actions were the product of defendants' desire to retaliate against him for filing grievances and making complaints about the way defendants were treating him. The undisputed facts show that none of the defendants were involved in the decision to transfer plaintiff. Therefore, I will grant defendants' motion for summary judgment on plaintiff's claim concerning his transfer and will address only the portion of his retaliation claim that relates to his discipline for fighting.

A prisoner who believes he has been disciplined more harshly than he would have been had he not engaged in protected free speech may initiate a lawsuit by filing a complaint in which he alleges the nature of the act in which he engaged, the act of retaliation and the government agent or agents who took the retaliatory action. If he alleges this much, he will

be allowed to proceed unless it is obvious from his allegations that he has no case. It may be obvious, for example, that the action in which the plaintiff engaged is not protected by the First Amendment. (Filing a lawsuit challenging a condition of confinement is a protected activity; speaking to a guard in a threatening manner is not. Ustrak v. Fairman, 781 F.2d 573, 580 (First Amendment not violated by prison regulation prohibiting inmate disrespect toward employees).)

Also, a court may deny an inmate leave to proceed if the allegedly retaliatory act is not one that could be said to have the effect of deterring an inmate "of ordinary firmness" from engaging in similar activity. Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989) (holding that harassment of employee for political beliefs is actionable "unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing [his] beliefs"); see also Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001) (in prison setting, "'the action taken [must be] sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights'") (quoting Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000)). Plaintiff was given 360 days in program segregation and 8 days of adjustment segregation. This is not a trivial deterrence.

At this stage of the lawsuit, plaintiff must show that he has sufficient evidence from which a jury could find that plaintiff's protected activity was one of the reasons why defendants gave him heavier discipline for fighting than it gave to plaintiff's cellmate,

Jenkins. (It is not clear from the record whether plaintiff did have harsher discipline: plaintiff has alleged that Jenkins received 180 days of "segregation." He does not say what kind of segregation this was. Depending on the kind, it might have been more punitive than plaintiff's 360 days of program segregation. This is a matter that plaintiff would have to prove at trial.)

Plaintiff has produced evidence of comments made by defendants that tend to show that defendants took adverse action against him because of his complaints about them and about his treatment at the Waupun Correctional Institution. If the jury believed that defendants Friday, Houser and Schultz had made the comments, it could reasonably believe that they had retaliated against plaintiff when they gave him a conduct report and when they imposed discipline upon him for what he says was self-defense.

Although plaintiff does not deny that he was part of a fight or that he should not have been issued a conduct report, he has offered enough evidence to call into question the content of the report. Defendant Friday charged plaintiff the violation of three DOC regulations: fighting, disruptive conduct and battery. If the jury believed that Friday made the statements plaintiff says he did, it could infer that plaintiff's prior complaints were one of the reasons Friday included three different charges in plaintiff's conduct report.

Defendants Houser and Schultz found plaintiff guilty of attempted battery for the fight with Jenkins. If these defendants made the statements plaintiff attributes to them, a

reasonable jury could find that they would have decided the matter differently had plaintiff not filed complaints about his broken nose and the prison's failure to protect him. Therefore, I will deny the cross-motions for summary judgment as to plaintiff's claims against Friday, Houser and Schultz for their alleged retaliation against him. "Summary judgment is inappropriate while the record remains a 'swearing contest.'" Babcock, 102 F.3d at 276.

If at trial, plaintiff adduces evidence to show that he engaged in protected activity and that his protected activity was a reason for defendants' decision to take an adverse action against him, it will become defendants' burden to show by a preponderance of the evidence that they would have taken the same disciplinary action even in the absence of the protected activity. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). See generally Johnson v. Kingston, 03-C-0143-C, slip op. at 13-25 (W.D. Wis. Nov. 20, 2003) (copy attached).

As to defendant Clements's approval of Friday's conduct report, plaintiff has failed to propose any facts that connect Clements to the retaliatory conduct. Although it is true that Clements had the authority to dismiss Friday's conduct report, plaintiff has not adduced any evidence that Clements knew of Friday's alleged improper motivation for writing the conduct report. As evidence of improper motive regarding conduct report no. 1199246-1603, plaintiff offers only the conversations he had with Burns and Friday, and the

conversation he overheard among Houser, Schultz and Alsum O'Donovan.

"'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'" Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."). There is no causal connection between defendant Clements's act of allowing the conduct report to stand and the alleged retaliatory motives of others in writing the conduct report and finding plaintiff guilty of the charges and punishing him. Therefore, I will grant defendants' motion for summary judgment on plaintiff's retaliation claim as it relates to defendant Clements.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants Daley, Zunker, Clements, Dittmann, Belgado, Houser, Schultz, Friday and Burns is GRANTED and plaintiff Lindell's motion for summary judgment is DENIED with respect to plaintiff's claim that Burns was deliberately indifferent to his safety when he ordered him to share a cell with Jenkins on

December 8, 2000;

2. The motion for summary judgment of defendants Daley, Zunker, Clements, Dittmann, Belgado, Houser, Schultz, Friday and Burns as well as the motion for summary judgment by defendants Bartels, Hasselhoff, and Lange is GRANTED and plaintiff's motion for summary judgment is DENIED with respect to plaintiff's claim that defendants Daley, Zunker, Dittmann, Belgado, Bartels and Hasselhoff were deliberately indifferent to his serious medical needs in failing to treat his nose as he wished;

3. The motion for summary judgment of defendants Bartels, Hasselhoff, and Lange is GRANTED and plaintiff's motion for summary judgment is DENIED with respect to plaintiff's claim that Lange intentionally mistreated plaintiff's facial pain by prescribing laxatives instead of pain relievers;

4. The motions for summary judgment of defendants Daley, Zunker, Clements, Dittmann, Belgado, Houser, Schultz, Friday and Burns and of plaintiff are DENIED as to the claim that defendants Friday, Houser and Schultz retaliated against plaintiff when they issued and found him guilty of battery attempt for conduct report no. 1199246-1603 and imposed as a penalty 8 days' adjustment segregation and 360 days' program segregation;

5. The motion for summary judgment of defendants Daley, Zunker, Clements, Dittmann, Belgado, Houser, Schultz, Friday and Burns is GRANTED and plaintiff's motion for summary judgment is DENIED as it relates to plaintiff's retaliation claim against

defendant Clements;

6. The motion for summary judgment of defendants Daley, Zunker, Clements, Dittmann, Belgado, Houser, Schultz, Friday and Burns is GRANTED and plaintiff's motion for summary judgment is DENIED concerning plaintiff's claim that defendants Friday, Clements, Houser and Schultz retaliated against him by transferring him to the Wisconsin Secure Program Facility;

7. The motion for summary judgment of defendants Daley, Zunker, Clements, Dittmann, Belgado, Houser, Schultz, Friday and Burns is GRANTED and plaintiff's motion for summary judgment is DENIED concerning plaintiff's claim that defendants Houser and Schultz retaliated against him for trying to obtain white nationalist literature when they issued him conduct report no. 1069010-674;

8. Defendants Daley, Zunker, Clements, Dittmann, Belgado, Burns, Bartels, Hasselhoff, and Lange are DISMISSED from this case.

9. A telephone conference will be held on December 2, 2003, at 9:00 a.m. before U.S. Magistrate Judge Stephen L. Crocker to schedule a new trial date. Defense counsel is requested to arrange the call.

Entered this 21st day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge