IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HARRISON FRANKLIN,

Plaintiff,

OPINION AND ORDER

v. 02-C-618-C

GARY R. McCAUGHTRY, GERALD BERGE, PAULINE BELGADO, SARGENT SIEDOSCHLAG, PETER HUIBREGTSE, LINDA HODDY-TRIPP, JIM WEGNER, SARGENT LIND, CAPTAIN JOHN P GRAHL, SARGENT DAN MEEHAN, CO II MIKE GLAMAN, NURSE HOLLY MEIER, PAM BARTELS, TODD BAST and STEVEN SCHOELER,[1]

Defendants.

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This is a civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Harrison Franklin is an inmate at the Wisconsin Secure Program Facility

[1] It appears from defendants' submissions that plaintiff has misspelled the names of several defendants. The proper spelling of "Pauline Belgado" is Paulino Belgado; "Sargent Siedoschlag" is Bruce Siedschlag; "Mike Glaman" is Michael Glamann; and "Steven Schoeler" is Steven Schueler. In addition, the full name of "Sargent Lind" is Bonnie Lind. I will use the correct spellings throughout this opinion rather than the names as they appear in the caption.

in Boscobel, Wisconsin. He contends that defendants violated his constitutional rights of free speech, access to the courts, and freedom from cruel and unusual punishment.

Defendants have filed a motion for summary judgment with respect to all of plaintiff's claims. Because plaintiff has failed to show that there are any genuine issues of material fact and defendants have shown that they are entitled to judgment as a matter of law, defendants' motion for summary judgment will be granted.

I must address several preliminary issues before setting forth the undisputed facts. On October 16, 2003, counsel for defendant Paulino Belgado filed a statement notifying plaintiff and the court that defendant Belgado had died on October 3, 2002. Federal Rule of Civil Procedure 25(a)(1) sets forth the procedure that must be followed when a party to a lawsuit dies:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the matter provided in Rule 4. . . . *Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.*

Although more than 90 days has passed since counsel for defendant Belgado filed the statement of death, no party or representative of defendant Belgado has moved for a substitution. Accordingly, all claims against defendant Belgado must be dismissed.

Hofheimer v. McIntee, 179 F.2d 789 (7th Cir. 1950) (because Rule 25(a)(1) uses word "shall," district court must dismiss action when no motion for substitution is made before deadline expires); see also Russell v. City of Milwaukee, 338 F.3d 662 (7th Cir. 2003) (affirming dismissal of § 1983 claim under Rule 25(a)(1) when counsel for deceased plaintiff failed to move for substitution within 90 days).

Plaintiff may protest that he was unaware of the requirements of Rule 25 and that because he is proceeding without counsel, the court should extend the 90-day deadline. Under Fed. R. Civ. P. 6(b), a court may extend deadlines imposed by the federal rules when the failure to act is a result of excusable neglect. Plaintiff would have an uphill battle persuading the court that his failure was a result of excusable neglect when counsel for defendant Belgado cited Rule 25 in the statement of death sent to plaintiff and filed with the court. Nevertheless, I have considered the merits of plaintiff's claims against defendant Belgado and conclude that they would fail even if plaintiff had filed a proper motion for substitution. No reasonable jury could find that Belgado violated plaintiff's Eighth Amendment rights.

Second, plaintiff has filed a motion under Fed. R. Civ. P. 56(g) to sanction defendant Hoddy-Tripp and Cindy Sawinski, a nursing supervisor at the Secure Program Facility, for filing affidavits made in bad faith. This motion will be denied. As discussed in the opinion, plaintiff has not shown that defendant Hoddy-Tripp "lied" to anyone about plaintiff's need

for eyeglasses. With respect to Sawinski, plaintiff alleges that she lied in her affidavit when she averred that plaintiff does not wear athletic shoes at the Secure Program Facility. Plaintiff should be aware that not every factual dispute in a lawsuit can serve as a basis for sanctions under Rule 56(g). Even assuming that plaintiff could show that Sawinski made her affidavit in bad faith, plaintiff would not be entitled to sanctions. It does not matter whether plaintiff is currently wearing special shoes for his foot condition because he has failed to show that defendants were deliberately indifferent to his health. A party is not entitled to sanctions under Rule 56(g) with respect to facts that are not material to the claim. Grube v. Lau Industries, Inc., 257 F.3d 723 (7th Cir. 2001).

Third, I note that defendants filed "additional" proposed findings of fact with their reply brief. Plaintiff has filed his own "2nd set" of proposed findings of fact with his motion for sanctions. This court's procedures to be followed on summary judgment do not permit parties to continually submit new evidence in support of their positions. Each party has one chance to tell his or her side of the story. Neither defendants nor plaintiff requested permission from the court to file additional proposed findings of fact or otherwise explained why they did not include these facts in their original submissions. Accordingly, I have not considered either side's supplemental facts.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Harrison Franklin is an inmate in the Wisconsin state prisons. Between 1996 and 2003, he was transferred multiple times. From 1996 until September 2000, he was incarcerated at the Waupun Correctional Institution in Waupun, Wisconsin. He was then transferred to the Wisconsin Secure Program Facility in Boscobel, Wisconsin, where he stayed until he was transferred back to Waupun at some point between April and October 2001. Plaintiff was placed in the health and segregation complex on January 25, 2002. He was in temporary lock-up status until February 8, 2002, in adjustment segregation from February 8, 2002, to February 16, 2002, and then in program segregation. Plaintiff is currently incarcerated at the Secure Program Facility, where he has been since May 2003.

A. Retaliation

On June 23, 2000, defendants Gary McCaughtry, Paulino Belgado and Bruce Siedschlag were served with plaintiff's complaint in Franklin v. McCaughtry, No. 00-C-157-C (W.D. Wis. 2000). Defendant McCaughtry is the warden of the Waupun Correctional Institution. Defendant Belgado was a physician at the Waupun Correctional Institution. Defendant Siedschlag is a correctional officer in the health and segregation complex at the Waupun Correctional Institution.

Also on June 23, defendants Daniel Meehan and Michael Glamann removed plaintiff

from his cell and placed him in temporary lock-up after learning of a tip from a confidential informant that plaintiff had received drugs from a visitor. Both Meehan and Glamman are correctional officers at the Waupun Correctional Institution. When plaintiff arrived at the health and segregation unit, defendants Meehan, Glamann and John Grahl, another correctional officer, conducted a strip search of plaintiff. Strip searches are regularly conducted before an inmate enters the complex to insure that the inmate does not have any contraband. During the search, Glamann noticed a "grease-like substance around Franklin's anus."

After the search, defendant Grahl returned plaintiff to temporary lock-up. A search of plaintiff's cell revealed a substance that tested positive for marijuana. The next day, plaintiff's urine tested positive for cannabinoids. Plaintiff had never tested positive for an illegal substance before this time and he has not tested positive since.

B. Adequate Medical Care

1. Treatment for finger

In October 1996, defendant Belgado treated plaintiff for a nose and sinus problem. He would not treat plaintiff's finger, telling plaintiff, "You are here for your sinus problem, not your finger."

Defendant Holly Meier was a nurse at the Waupun Correctional Institution. Meier

was disciplined in 1997 for "expos[ing] [an inmate] to a risk of harm to which a minimally competent nurse would not expose a patient." The incident occurred in 1990 and had nothing to do with plaintiff.

Plaintiff's medical records contain the following "progress note" written by Meier and dated April 3, 1997:

> S[ubject]: Seen in Nprogram Rds [Nursing Program Rounds]— came to sit down for MD interview & refusing. PT [patient] doesn't want to pay 2.50. Scheduled to see MD per HSR [health services request] 3/26/97 c/o [complaining of] skin and fingernail infection, lumps on eyelids, nose, neck & inside nose and open sore on finger — requests Nystatin for skin & fingernail infections. O[bjective]: Refused MD eval. NAD. [A]ssessment: Refused MD eval. P[lan]: Refusal form.

Defendant Meier would not treat plaintiff unless he paid a $2.50 co-payment. He asked for Nystatin because he had seen television commercials for the drug and because staff from the health services unit encouraged him to ask for it.

Plaintiff saw defendant Meier again on November 21, 1997; plaintiff complained about his finger again. In the progress notes, Meier wrote "fungus infection" and "2nd fingernail medial aspect eroded." She made a doctor's appointment for plaintiff with defendant Belgado for his "fungal nails."

Defendant Belgado examined plaintiff on December 3, 1997, and prescribed a topical cream for plaintiff's finger. On May 4, 1998, plaintiff returned to defendant Belgado, complaining again about his finger. Belgado prescribed a triple-antibiotic ointment and

band-aids, to be applied for three months. Plaintiff saw a nurse in July 1998, who noted that she saw "no sign of infection," but advised plaintiff nevertheless to continue treating his finger with the ointment. During 1998, plaintiff told defendant Belgado repeatedly that the antibiotic ointment was not curing the infection on his finger. Belgado examined plaintiff again on May 5, 1999. He again prescribed triple-antibiotic treatment for two months.

On June 10, 1999, the interphalangeal joint of plaintiff's right finger was amputated. According to the pathology report, plaintiff had squamous cell carcinoma. If a doctor had performed a skin or tissue biopsy on plaintiff's finger in 1995, it would not have prevented the partial amputation of his finger.

In a letter dated November 16, 2001, plaintiff asked defendant McCaughtry to intervene because "the I.C.R.S. refuses to [acc]ept my complaint." In addition, he wrote, "I fear that I will be retaliated against solely for exercising my rights to exercise and proper medical treatment." (In his proposed findings of fact, plaintiff states that he wrote McCaughtry a letter addressing issues such as "the size of the rec cages, lack of exercise equipment, and inability to see outside." However, the letter he cites does not support this fact.)

2. Treatment for diabetes

a. Failure to treat

Defendant Pamela Bartels was the health services administrator at the Secure Program Facility from November 1999 until September 2002. In March 2001, plaintiff had his blood drawn at the University of Wisconsin Hospital. In October 2001, plaintiff spent one week at the hospital being evaluated for diabetes. (Neither party proposes any facts about why plaintiff was being tested for diabetes at this time.) A doctor at the hospital diagnosed plaintiff with diabetes mellitus type 2.

Defendant Bartels never informed plaintiff or directed any of her staff to inform him that he had high blood sugar levels while he was at the Secure Program Facility. Plaintiff did not receive any treatment for diabetes at the Secure Program Facility during 2000 or 2001.

b. Denial of medication

Defendant Bonnie Lind is a correctional sergeant at the Waupun Correctional Institution. From time to time, Lind works in the health and segregation complex. Lind worked in the health segregation complex at least once in April 2002, four times in July 2002, once in August 2002, three times in September 2002, six days in October 2002, five times in November 2002 and once in December 2002.

Plaintiff often received his medication from officers in the segregation unit.

c. Diabetic diet

After diagnosing plaintiff with diabetes, a doctor from the hospital recommended that plaintiff receive a 2400-calorie diet, a prescription for glucose-lowering drugs and insulin injections when his blood sugar level exceeded 250. Defendant Belgado told plaintiff that he would not receive a special diet while he was housed in the segregation unit. Nevertheless, he prescribed a 2400-calorie diet for plaintiff. It then became the responsibility of the nursing staff to complete a special diet order form to be sent to the kitchen staff. Plaintiff did not receive a 2400-calorie diet.

3. Eyeglasses

On November 30, 2000, plaintiff submitted an inmate complaint, stating that his glasses had been taken from him and he needed new ones. The inmate complaint examiner sent an email to defendant Linda Hoddy-Tripp, the corrections unit supervisor, asking if she could "shed some light" on plaintiff's complaint. When defendant Hoddy-Tripp spoke with plaintiff, he told her what happened to his glasses. He also told her about the importance of being able to see. After speaking with plaintiff, defendant Hoddy-Trip responded to the examiner that one of the "arms" of the glasses had been missing when plaintiff entered the prison.

A member of the prison staff scheduled an appointment for plaintiff on December 11, 2000, with a doctor in the health services unit. After the appointment, the doctor concluded

that plaintiff "appear[ed] in no distress." In addition, he wrote, "Please expedite [appointment with] optometry so [inmate] can get new glasses."

Defendant Hoddy-Tripp and defendant Bartels exchanged a number of emails about plaintiff's glasses in December 2000. On December 12, Hoddy-Tripp asked Bartels, "[D]oes he HAVE to have the broken ones . . . to see til the others come." Bartels responded the following day, "[T]he broken ones were sent to property. It may be beneficial to give him something. His glasses were not broken, they were altered." One week later, Hoddy-Tripp again asked Bartels, "[D]oes he HAVE to have his glasses to see and, have his new glasses been ordered (and when) — and if so, when [will] they be coming." When Bartels responded that the glasses could not be ordered without an eye exam, Hoddy-Tripp asked, "But can he see now without them??????????????" Bartels's answer was that she had "no idea. He is not blind, his vision may be blurry, he may strain his eyes, I previously suggested giving them to him until he gets a replacement, but you may wish to look at the way he altered them."

In January 2001, defendant Hoddy-Tripp concluded that plaintiff's glasses "are altered in such a fashion that they cannot be given to the inmate — he is not blind or in need of them that badly, HSU says, and he's on the list to be seen." Plaintiff received an eye examination on February 10, 2001.

In an information request form to defendant Hoddy-Tripp dated February 12, 2001,

plaintiff wrote, "I have [an] I.C.I. here from John Ray in Madison stating that my glasses [were] returned to me. Obviously, someone from this inst. lied to him." In response, Hoddy-Tripp wrote, "This was probably my fault. I got you mixed up with another inmate. Sorry." In addition, Hoddy-Tripp wrote: "I spoke w/ you and you stated your doctor appointment was Saturday and you'd be getting a new pair in 1-2 weeks. I also talked [to] HSU to see if there was any follow up needed. You can also contact them if you wish."

Plaintiff received new glasses on March 5, 2001.

4. Exercise

Defendant Steven Schueler is a program captain at the Waupun Correctional Institution. He is responsible for the health and segregation unit. Under defendant McCaughtry's policy, inmates in program segregation may exercise outside their cell for up to four hours each week in one hour increments.

In October 2001, defendant Belgado ordered "med rec" for plaintiff. Plaintiff received medical recreation four times a week from November 2001 until January 2002, when he was placed in segregation.

5. Shoes

Plaintiff suffers from a foot condition called plantar fasciitis. (Neither party has

proposed any facts regarding the nature of this condition.) Physicians at the University of Wisconsin have recommended that the prison provide plaintiff with "athletic-style" shoes to make his feet more comfortable. In June 2001, a doctor at the prison wrote plaintiff a prescription "to obtain athletic style shoes (1 pair) if allowed for [inmate] level."

When plaintiff did not receive these shoes, he asked defendant Belgado in September 2001 to write an order allowing him to have "special shoes" while he was in the segregation unit. Belgado denied the request. On December 17, 2002, a nurse in the health services unit prepared a "special needs" form for plaintiff for orthopedic shoes and inserts. Plaintiff submitted a request for the shoes the following day. The request came back to him with the message, "Denied at HSC 12-20-02 per Capt. Schueler."

Plaintiff would feel pain if he had to stand "for any length of time" without athletic shoes. He stopped exercising.

As an inmate in segregation, plaintiff's need to walk distances was limited. He did not have to leave his cell to eat or use the toilet. The shower was in the "same range" as his cell. Nurse Mary Gorske instructed plaintiff to engage in exercises that would not hurt his feet, such as crunches and stretching. High-impact exercises such as jumping jacks would hurt plaintiff's feet whether or not he was wearing orthopedic shoes.

Plaintiff never received athletic-style shoes while he was incarcerated at the Secure Program Facility. These shoes are not permitted on any of the levels in the prison. Plaintiff

has received an order from the health services staff at the Secure Program Facility to be provided with "orthotics for shoes" for an indefinite period of time.

6. Mattress

In May 2001, Dr. Todd Riley prescribed plaintiff an "extra mattress" for three months. Riley wrote that plaintiff experienced lower back pain "but gives no indication of radicular symptoms." In addition, he wrote, "back appears supple." In July 2001, defendant Belgado prescribed plaintiff an "egg crate mattress." A nurse changed the prescription to a "blue mattress." Egg crate mattresses are not permitted in the Waupun Correctional Institution.

Plaintiff was provided with a blue mattress until he was placed in segregation in January 2002. Inmates in segregation have greater restrictions on their property than inmates in the general population. If a property item is not on the segregation property list, an inmate will be permitted to keep the item only if it is medically necessary. Generally, inmates in segregation may possess one "state-issued mattress." Because health services staff determined that it was not medically necessary for plaintiff to have a "non-standard" mattress, he was not allowed to have an extra or special mattress while he was housed in segregation.

C. Legal Mail

State Representative Sheldon Wasserman sent plaintiff a letter dated September 7, 2000, that plaintiff received on September 20, 2000. During September 2000, defendant Todd Bast was employed by the Secure Program Facility as a mailroom officer. He does not remember opening or reading the letter from Wasserman.

On October 3, 2003, Leonard Avery received a letter addressed to plaintiff that was from "Sonnenschein, Nath and Rosenthal." On the envelope was written, "open in the presence of the inmate." After Avery realized the letter was not addressed to him, he returned the letter to a correctional officer, who forwarded the letter to plaintiff.

In a letter to defendant Berge dated October 15, 2000, plaintiff wrote: "My legal mail is being opened and read and copies are being made of those materials contained within." Defendant Hoddy-Tripp responded on behalf of defendant Berge: "To my knowledge your legal mail is not being opened and no photocopies are being made. This would be a serious allegation and yo[u] should submit your proof to me."

In a letter addressed to "the security director," dated October 15, 2000, plaintiff complained about numerous issues, including lack of medical privacy, an inability to review his medical file more than once every six months and being subjected to searches when using the law library. In addition, plaintiff complained, "My legal mail is being opened, read and copied, without my consent and not in my presence." (Plaintiff believed that defendant

Peter Huibregtse was the security director of the Secure Program Facility. However, Huibregtse is not the security director but the deputy warden. The facts do not show whether Huibregtse or any other prison official ever read plaintiff's letter.)

OPINION

A. Retaliation

Prison officials may not retaliate against inmates for the exercise of a constitutional right. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Filing a lawsuit against a prison official is an act protected by the First Amendment. See Zorzi v. County of Putnam, 30 F.3d 885, 896 (7th Cir. 1994). To allow a jury to find in his favor, plaintiff must show that the exercise of his constitutional rights was one of the reasons that the defendants took action against him. Johnson v. Kingston, __ F. Supp. 2d __ , No. 03-C-143-C, 2003 WL 22750740 (W.D. Wis. Nov. 20 2003).

Plaintiff has adduced no evidence that defendants Grahl, Meehan and Glamann even knew about plaintiff's lawsuit against defendants Siedschlag, McCaughtry and Belgado when they conducted the June 23, 2000 search about which he complains. Without such evidence, his retaliation claim must fail as to these defendants. Morfin v. City of East Chicago, 349 F.3d 989, 1005 (7th Cir. 2003) ("The protected conduct cannot be proven to motivate retaliation if there is no evidence that the defendants knew of the protected

activity.") (internal quotations and alterations omitted). In his response to defendants' proposed findings of fact, plaintiff writes that they did know because he told them during the search that "the only reasons y'all fucking with me is because your boss got served those lawsuit papers today." Plt.'s Resp. To Dfts.' PFOF, dkt. #90, at 18, ¶173. Even if this is true, it does little to help plaintiff's case; evidence that defendants learned of the earlier lawsuit *during* the search is not probative of their intent to conduct the search initially.

Of course, defendants Siedschlag, McCaughtry and Belgado did know about the lawsuit because they were served with the complaint. However, this is as far as plaintiff gets. Plaintiff must show not only that these defendants knew about his lawsuit but also that they were personally involved in the alleged unconstitutional conduct. Doyle v. Camelot Care Centers, 305 F.3d 603, 614-15 (7th Cir. 2002). He has submitted no evidence that defendants Grahl, Meehan and Glamann were directed to investigate plaintiff by defendants Siedschlag, McCaughtry or Belgado or that they even knew about plaintiff's search.

Therfore, even if plaintiff were correct that Grahl, Meehan and Glamann had no factual basis for concluding that he was in possession of an illegal substance and that the whole investigation was a sham, his retaliation claim would fail nevertheless. It is not enough for plaintiff to show that defendants took adverse action against him without checking their facts or even that they *knew* that plaintiff was not harboring contraband. (Of course, strip searching a prisoner for no reason other than to harass him could violate the

inmate's right to be free from excessive force. Calhoun v. Detella, 319 F.3d 936 (7th Cir. 2003). Although plaintiff raised a claim of excessive force in his complaint, I later dismissed this claim because plaintiff had not exhausted his administrative remedies with respect to that claim. May 27, 2003 Op. and Order, dkt. #30, at 12. Therefore, plaintiff's proposed facts about the intrusiveness of the search are no longer relevant in determining liability in this case.)

As noted above, to prevail on a retaliation claim, plaintiff must show that defendants took action against him because he exercised his constitutional rights. Because plaintiff has failed to show any causal link between his former lawsuit and the decision to strip search him or place him in temporary lock-up, defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendants Siedschlag, McCaughtry, Belgado, Grahl, Meehan and Glamann retaliated against him for exercising his right to gain access to the courts.

B. Medical Treatment

Prisoners have a constitutional right to adequate medical care under the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 103 (1976); see also Walker v. Benjamin, 293 F.3d 1030, 1036-37 (7th Cir. 2002). To establish a violation of that right, plaintiff must show both that he had a "serious medical need" and that the prison officials who denied him

care were "deliberately indifferent" to his health. Perkins v. Lawson, 312 F.3d 872, 875 (7th Cir. 2002) (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

The Court of Appeals for the Seventh Circuit has held 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 the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Deliberate indifference means more than inadvertent error, negligence or even gross negligence. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. De Tella, 95 F.3d 586, 590-91 (7th Cir. 1996). Rather, the official must be aware that a prisoner faces a substantial risk of serious harm if he is not treated. Farmer, 511 U.S. at 837.

1. Finger

a. Defendants McCaughtry and Wegner

Plaintiff brings his claim of inadequate treatment for his finger against defendants Belgado, Meier, McCaughtry and Wegner. McCaughtry is the warden of the Waupun Correctional Institution and Wegner was a program supervisor. With respect to defendant McCaughtry, plaintiff relies on a letter he wrote to McCaughtry in which he told McCaughtry that his complaints were being rejected and he was afraid that he was being

retaliated against for "exercising my rights to . . . proper medical treatment." The letter does not identify what medical treatment he was seeking or why he needed it. The letter does not show that defendant McCaughtry knew of an excessive risk to plaintiff's health and disregarded it. Farmer, 511 U.S. at 837 ("a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety").

In his proposed findings of fact, plaintiff writes that McCaughtry and Wegner may be held liable because they "are responsible for the care of inmates and the level of protection/services received from staff under [their] direct supervision." Plt.'s PFOF, dkt. #90, at 1, ¶ 29. However, plaintiff has failed to show that either defendant Wegner or defendant McCaughtry had any involvement in the decisions regarding the proper course of treatment of his finger or even that they were aware of his treatment.

Even if it could be inferred that defendant McCaughtry, as the prison's warden, would have known about plaintiff's condition, plaintiff points to no evidence that McCaughtry believed that plaintiff was receiving inadequate care and that McCaughtry deliberately ignored the risk to plaintiff's health even though he could have intervened. In a case brought under 42 U.S.C. § 1983, a defendant may not be held liable simply because he was the supervisor of an employee who acted improperly. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Rather, plaintiff must show that each defendant participated in, directed

or consented to the unconstitutional conduct. Morfin v. City of East Chicago, 349 F.3d 989 (7th Cir. 2003). In addition, it is not enough to show that defendants may have breached a duty under the Wisconsin Administrative Code. Violations of state law may not be enforced under § 1983. Hamlin v. Vaudenberg, 95 F.3d 580, 583 (7th Cir. 1996). Because plaintiff has failed to show that defendants Wegner and McCaughtry had any involvement in deciding his course of treatment, plaintiff's claims against them must be dismissed.

b. Defendant Meier

Plaintiff's claim against defendant Meier is based on her refusal to examine his finger because he would not agree to pay a $2.50 co-payment. Defendants argue first that this claim should be dismissed because plaintiff failed to exhaust his administrative remedies on this claim. I have already rejected this argument in deciding defendants' motion to dismiss. May 27, 2003 Op. and Order, dkt. #30, at 10-12. There is no need to repeat that discussion here.

Nevertheless, plaintiff's claim against defendant Meier must be dismissed because he has not shown that a reasonable jury could find that she was deliberately indifferent to a serious medical need. A health professional does not violate the Eighth Amendment simply because she enforces a prison policy requiring a modest co-payments for treatment. At some point, requiring payment for medical treatment could be cruel and unusual punishment if

it could be shown that the inmate's condition was so serious that any delay in treatment could pose a substantial risk of serious harm. In this case, however, there is no evidence that plaintiff's need for treatment was so apparent in April 1997 that it should have been obvious to defendant Meier that she must disregard the policy requiring co-payments. Snipes, 95 F.3d at 592 (no Eighth Amendment violation unless "medical treatment is so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.")

Defendant Meier's belief was that plaintiff had a "fingernail infection." Plaintiff has put in no evidence showing that a failure to treat a fingernail infection immediately would pose a substantial risk of serious harm. Plaintiff's evidence that Meier was disciplined for failing to provide adequate care to an inmate is not probative because the disciplinary action related to an incident that involved another inmate seven years earlier. Accordingly, defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendant Meier subjected him to cruel and unusual punishment by refusing to treat him without a co-payment in April 1997.

c. Defendant Belgado

Plaintiff's Eighth Amendment claim against defendant Belgado fails for similar reasons. Although the facts show that plaintiff complained to defendant Belgado about his

finger on numerous occasions, there is no evidence that Belgado knew that plaintiff had skin cancer on his finger or that Belgado's failure to detect the seriousness of plaintiff's condition earlier was so blatantly inappropriate that he violated the Eighth Amendment. It is undisputed that Belgado was treating plaintiff's finger continuously in 1997 and 1998. This is evidence that defendant Belgado was not deliberately indifferent to plaintiff's health. Farmer, 811 U.S. at 844 (no Eighth Amendment liability if prison officials "responded reasonably to the risk, even if the harm ultimately was not averted"). Perhaps Belgado should have realized sooner that the ointment was ineffective and that further tests should have been conducted. However, both the Supreme Court and the Court of Appeals for the Seventh Circuit have made clear that acts of negligence do not constitute cruel and unusual punishment, even if they are repeated several times. E.g., Estelle, 429 U.S. at 105-06; Sellers v. Henman, 41 F.3d 1100 (7th Cir. 1994). Defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendant Belgado was deliberately indifferent to plaintiff's health by failing to diagnose and treat his squamous cell carcinoma.

2. Diabetes

a. Diagnosis

Plaintiff's claim against defendant Bartels is that she failed to treat his diabetes while he was incarcerated at the Secure Program Facility. However, it is undisputed that plaintiff

was not diagnosed with diabetes until *after* he was transferred back to the Waupun Correctional Institution in 2001. In his proposed findings of fact, plaintiff writes that his blood was drawn at the hospital in March 2001 while he was still an inmate at the Secure Program Facility and that the results showed "alarming blood sugar levels." Plt's PFOF, dkt #90, at 33, ¶90. However, his only support for this conclusion is his own affidavit. Plaintiff is not a physician or otherwise qualified to testify that his blood sugar levels were "alarming." Pearson v. Ramos, 237 F.3d 881 (7th Cir. 2001) (lay person not qualified to testify on cause of his medical condition).

In his brief, plaintiff argues that he was unable to obtain his medical records from the hospital because defendants have refused to produce them. Plt.'s Br., dkt. #89, at 6. Although plaintiff filed at least three motions to compel in this case, I am not aware that any of them addressed a refusal to produce blood test results. (Plaintiff did seek to compel production of some medical records, but these were denied because he had not signed a medical release.)

However, even assuming that plaintiff had evidence that his blood sugar levels were "alarming" in March 2000, this would not be enough to present his claim against defendant Bartels to a jury. There is no evidence in the record that defendant Bartels *knew* that plaintiff had abnormal blood sugar levels or that she knew that plaintiff would be subjected to a substantial risk of serious harm without immediate treatment. Plaintiff suggests that

defendant Bartels *should* have known that he was at risk because she was the health services administrator. Unfortunately for plaintiff, even if defendant Bartels was negligent in failing to take a more proactive approach to his health care, negligent behavior is not enough to sustain a claim under the Eighth Amendment. Cavalieri v. Shepard, 321 F.3d 616, 624-25 (7th Cir. 2003). Because plaintiff has not adduced any evidence that defendant Bartels was deliberately indifferent to a serious medical need, I must grant defendant Bartels's motion for summary judgment.

b. Diabetic diet

The failure to provide inmate diabetics with a special diet could be cruel and unusual punishment in some circumstances. See Sellers v. Henman, 41 F.3d 1100, 1102-03 (7th Cir. 1994). Plaintiff argues that defendant Belgado's deliberate indifference is shown by his statement to plaintiff that he would not receive a special diet while he was in segregation. (Defendants were unable to dispute plaintiff's proposed factual finding because Belgado died before they received plaintiff's proposed findings of fact.) Although a prison official's statements could be evidence of deliberate indifference, it is his conduct and not his speech that is most probative in showing that a defendant acted with reckless disregard for the inmate's health. Means v. Cullen, __ F. Supp. 2d __ , 2003 WL 23095984, at *4 (W.D. Wis. Dec. 12, 2003) (no showing of deliberate indifference even though defendant told

plaintiff that "no one would care if he died" because defendant had recommended that plaintiff remain under clinical observation to insure his safety).

Regardless what defendant Belgado told plaintiff, it is undisputed that he did order plaintiff a special diet. If plaintiff did not receive a special diet because the nursing or kitchen staff failed to implement Belgado's order, Belgado could not be held liable for this failure unless he knew that no action had been taken. Plaintiff points to no evidence in the record showing that Belgado knew that plaintiff was not receiving a special diet; it appears that plaintiff did not complain to Belgado or to anyone else when Belgado's order was not implemented. Therefore, even assuming that being deprived of a 2400-calorie diet subjected plaintiff to a substantial risk of serious harm, this claim must be dismissed because plaintiff has not shown that defendant Belgado was deliberately indifferent to his health.

c. Threat to withhold medication

In the January 28, 2003 opinion and order, I allowed plaintiff to proceed on a claim that defendant Lind violated his Eighth Amendment rights by threatening to withhold his insulin medication. Although plaintiff had not alleged that Lind ever carried out her threat, I allowed plaintiff to proceed on the theory recognized in Helling v. McKinney, 509 U.S. 25, 33 (1993), that "a remedy for unsafe conditions need not wait a tragic event." However, vulgar language or vague threats are not sufficient to show an Eighth Amendment violation.

Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir. 1987) (prison official's use of vulgar language did not violate inmate's civil rights); Martin v. Sargent, 780 F.2d 1334 (8th Cir. 1985) (inmate rights not violated by threat that he would have a "bad time" if he refused to cut his hair and shave his beard). Plaintiff must still show that he was subjected to a substantial risk of serious harm.

Plaintiff has failed to develop the facts surrounding his claim against defendant Lind. He has proposed only one fact about this claim and it is essentially the same conclusory allegation contained in his complaint: "Defendant Bonnie Lind threatened my life by threatening to withhold my insulin." Plt.'s PFOF, dkt. #90, at 35, ¶107. He does not identify when the incident occurred, what Lind said to him, whether she threatened to withhold medication in the future or in what context she made the threat. I cannot conclude that plaintiff's single, conclusory allegation is sufficient to defeat defendants' motion for summary judgment. The Federal Rules of Civil Procedure require a non-moving party to set forth "specific facts" showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that

cite specific concrete facts establishing the existence of the truth of the matter asserted."). Because plaintiff has not put in evidence that would permit a reasonable jury to find that defendant Lind subjected him to a substantial risk of serious harm, defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendant Lind violated his Eighth Amendment rights by threatening him.

3. Eyeglasses

In his complaint, plaintiff alleged that he was denied eyeglasses for three months because defendant Hoddy-Tripp said, untruthfully, that he already had glasses. In some instances the deprivation of eyeglasses could constitute a serious medical need. See, e.g., Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (need for eyeglasses is serious medical condition when inmate suffered headaches, his vision deteriorated and his daily activities were impaired).

Plaintiff's evidence that defendant Hoddy-Tripp lied in order to prevent him from receiving his glasses is her message to him that she "probably" got plaintiff mixed up with another inmate and told an inmate complaint examiner that plaintiff's glasses were returned to him. However, there is no evidence that Hoddy-Tripp misinformed the examiner intentionally or that plaintiff would have gotten his glasses any sooner if the examiner had received the correct information. By the time plaintiff had written his information request

to defendant Hoddy-Tripp, he had already received an eye examination and was waiting for the new pair of glasses to be shipped.

The remaining evidence in the record also fails to show that defendant Hoddy-Tripp was deliberately indifferent to plaintiff's health. Although the facts are not clear with respect to when and for what reason plaintiff's glasses were taken from him, plaintiff points to no evidence showing that Hoddy-Tripp was involved in that decision. Once she was informed that plaintiff was without glasses, she took immediate steps to find out how dire plaintiff's need was and what was being done to replace his glasses. The facts do not show that there was anything Hoddy-Tripp could have done to get plaintiff new glasses sooner.

It is true that defendant Bartels had suggested to defendant Hoddy-Tripp that plaintiff be given his "altered" glasses while he was waiting for his new pair and that Hoddy-Trip chose not to do this. However, Bartels never told Hoddy-Tripp that plaintiff had an urgent need for glasses. She said only that "it may be beneficial to give him something" and that "his vision may be blurry." In addition, she told Hoddy-Tripp that she "may wish to look at the way [plaintiff] altered" his glasses before deciding whether to allow him to keep them. From this information, Hoddy-Tripp concluded that the security risk in giving plaintiff "altered" glasses outweighed plaintiff's need for them. Although Hoddy-Tripp may have overestimated the security risk and underestimated plaintiff's need for glasses, the available evidence would not allow a reasonable jury to infer that she was deliberately

indifferent to a serious medical need. In addition, I note that plaintiff has failed to adduce any evidence that he was unable to function without his glasses or that he was in any pain. Defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendant Hoddy-Tripp violated his Eighth Amendment rights by temporarily preventing him from having glasses.

Plaintiff was allowed to proceed on this claim against defendants Gerald Berge and Peter Huibregtse because he alleged in his complaint that he complained to these defendants but they failed to intervene. Plaintiff has failed to adduce any evidence of Berge's or Huibregtse's involvement in a denial of eyeglasses. Plaintiff writes in his brief (but not in his proposed findings of fact) that he complained to Berge and Huibregtse about defendant Hoddy-Tripp. Even if I overlooked plaintiff's failure to comply with this court's rules for submitting evidence in response to a motion for summary judgment, plaintiff's claim against Berge and Huibregtse would fail because I have concluded that plaintiff has not shown that Hoddy-Tripp was deliberately indifferent to his health or safety. Prison officials cannot be held liable under the Eighth Amendment for failing to stop another person's lawful conduct. Accordingly, defendants Berge and Huibregtse must be dismissed.

4. Adequate exercise

Long term deprivations of exercise may violate a prisoner's Eighth Amendment rights

when the prisoner's health is threatened. Delaney v. De Tella, 256 F.3d 679, 686 (7th Cir. 2001); Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996). Plaintiff has failed to put forth any evidence that he was denied exercise for a long period of time, that his health was threatened or that defendant Schueler was personally responsible for any deprivation of exercise. (Defendant Schueler was the only defendant that plaintiff named for his claim of inadequate exercise.) Plaintiff cites his inmate complaints to support his claim, but these complaints cannot be used to show that he was denied exercise, only that he complained, which does not provide evidence for his claim.

Plaintiff writes that "the record does not adequately reflect when rec opportunities are offered, accepted and/or refused." Plt.'s PFOF, dkt. #90, at 23, ¶222. However, to the extent that the record is unclear, this is a problem for plaintiff, not defendants. It is apparent from plaintiff's brief that he believes that it is *defendants'* burden to show that there are no genuine issues for trial. Thus, plaintiff's position is that if neither party establishes how much exercise he received (or what kind of medical treatment defendants gave him or the reasons defendants acted as they did), defendants' motion for summary judgment must be denied.

Plaintiff misunderstands each party's burden on a motion for summary judgment. Defendants' burden is limited to pointing out why they are entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). As the party bearing the burden of

persuasion on this claim, it is plaintiff's obligation to show that there is sufficient evidence to allow a reasonable jury to find in his favor. Morfin, 349 F.3d at 997("the burden is on the non-moving party to come forward with specific facts in the record that demonstrate there is a genuine issue for trial"). Defendants do not have to *disprove* plaintiff's claim to show that they are entitled to summary judgment; they need only point to the absence of evidence supporting his claim. Bank of Illinois v. Allied Signal Safety Restraint Systems, 75 F.3d 1162, 1168 (7th Cir. 1996) (defendants are "under no obligation to negate the plaintiffs' claim" to prevail on motion for summary judgment).

In essence, plaintiff is conceding that it cannot be determined from the current record when or how often he was denied exercise. A court may not allow a claim to proceed to trial on the possibility that there may be evidence "somewhere" that could support a plaintiff's claim. The court of appeals has often observed that summary judgment is the "put up or shut up" moment in a lawsuit. Schacht v. Wisconsin Department of Corrections, 175 F.3d 497, 504 (7th Cir. 1999). This means that to defeat defendants' motion for summary judgment, he was required to "show what evidence [he had] that would convince the trier of fact to accept [his] version of events." Id. Plaintiff has failed to do this. Accordingly, defendants' motion for summary judgment will be granted with respect to plaintiff's claim that he was denied adequate exercise.

5. Mattress

Defendant Belgado is the only defendant against whom plaintiff is proceeding on his claim that his Eighth Amendment rights were violated when he was denied a special mattress. Even assuming that the denial of a special mattress could constitute an Eighth Amendment violation, plaintiff has failed to adduce any evidence that it was defendant Belgado who made the decision to deny plaintiff permission to have a special mattress while he was housed in segregation. The facts show only that he was not allowed to have a mattress because "health services staff" decided that a special mattress was not medically necessary for him. Plaintiff points to no facts in the record showing that defendant Belgado was one of the staff members that made this decision or that Belgado even knew that staff in the segregation unit denied plaintiff a special mattress. Rather, the only facts in the record specific to Belgado show that he was the doctor who originally prescribed a special mattress for plaintiff. Because there is no basis in the record from which it could be inferred that defendant Belgado was personally involved in the decision to deny plaintiff a special mattress while he was in segregation, this claim must be dismissed.

5. Shoes

Most of plaintiff's proposed findings of fact on this issue emphasize that he followed all of the proper procedures to obtain special shoes, that providing an accommodation would

not have caused a threat to security and that defendants had the authority to allow him to have special shoes even while he was housed in the segregation unit. Assuming that these facts are true, they do not support plaintiff's claim. In analyzing any claim under the Eighth Amendment, the question is not what the defendants were *authorized* to do, but what the Eighth Amendment *required* them to do.

Plaintiff's frustration is understandable. After he was successful in acquiring accommodations for his medical conditions, those accommodations were taken away from him when he was put in segregation. Defendants may have been less considerate of plaintiff's needs than they could have been and their judgment that security concerns necessitated their decision may have been incorrect. Regardless, to prevail on his claim, plaintiff was required to do more than show that defendants' decision was not absolutely necessary or that reasonable minds could disagree on the most appropriate course of action. Rather, plaintiff must show that defendants were deliberately indifferent to a serious medical need. He has failed to do this.

With respect to showing that he had a serious medical need, plaintiff cannot prove an Eighth Amendment violation by pointing to evidence that doctors had *recommended* that he have athletic shoes. The Eighth Amendment does not require prison officials to provide inmates with every amenity that could be beneficial to their health. Plaintiff must adduce evidence that the failure to provide him with shoes subjected him to a substantial risk of

serious harm.

Plaintiff has proposed facts that without athletic shoes, he could not stand for "any length of time" without pain, and that with athletic shoes, he can stand for "long periods of time" and walk without pain. Plt.'s PFOF, dkt. #90, at 29, ¶48. Even assuming that this would be sufficient to show that plaintiff had a serious medical need, he has not proposed any facts that he *told* defendant Belgado or defendant Schueler or that they otherwise knew that plaintiff's problem was this severe. Rather, the facts show only that defendant Belgado denied plaintiff's request for athletic shoes and that defendant Shueler was involved in the decision to rescind the nurse's order for orthopedic shoes while he was in segregation. This is insufficient to show that defendants *knew* that plaintiff would experience significant pain if he did not receive athletic shoes.

The facts show that plaintiff did not exercise when he did not have special shoes. However, plaintiff does not point to any evidence that he was *unable* to exercise without special shoes or that special shoes would have made a significant difference in his ability to exercise. It is undisputed that nurse Gorske instructed plaintiff on exercises that he could perform without harming his feet. In addition, the facts show that, even with orthopedic shoes, plaintiff would have been unable to engage in many types of exercise without pain.

Plaintiff also proposes as facts that being denied special shoes caused or exacerbated his peripheral neuropathy and that "[a]s a result of being denied athletic-style shoes for so

long, I now have to wear athletic-style shoes indefinitely." Plt.'s PFOF, dkt. #90, at 13, ¶125; id. at 29, ¶49. In support of his assertion about neuropathy, plaintiff cites the report and affidavit of Mary Gorske, a nurse practitioner at the Waupun Correctional Institution. However, the materials cited by plaintiff do not support a finding that he suffered from neuropathy or that, if he did, it was caused or exacerbated by not having special shoes. Rather, Gorske wrote that peripheral neuropathy *can be* a complication that is caused by *diabetes*, not by plaintiff's foot condition. Aff. of Gorkse, dkt. #70, at 4, ¶14; Report of Gorske, dkt. #58, at 2. She does not say that plaintiff suffered from peripheral neuropathy or that lack of special shoes caused or exacerbated the condition.

With respect to his assertion that he will have to wear orthopedic shoes indefinitely, plaintiff cites a form from health services staff dated June 5, 2003, which states that plaintiff is to be provided with "orthotics for shoes" from June 5, 2003 until "indef." At most, this form would support a finding that, as of June 5, 2003, plaintiff would be permitted to wear orthopedic shoes until he was notified otherwise. It does not support a conclusion that the previous denial of special shoes worsened his condition.

Plaintiff has failed to show either that defendant Shueler or defendant Belgado was deliberately indifferent to his health or that being deprived of orthopedic shoes subjected him to a substantial risk of serious harm. Accordingly, defendants' motion for summary judgment will be granted on plaintiff's claim that defendants Schueler and Belgado violated

his Eighth Amendment rights by denying him orthopedic shoes.

6. Summary

The record makes clear that plaintiff suffers from numerous health problems. I do not doubt that it is difficult living with a serious condition such as diabetes or a cancerous finger. In a perfect world, prisoners and non-prisoners alike would be free of pain and receive top-quality care for their medical conditions. As I am sure plaintiff is aware, prisons do not exist in a perfect world. Although many of plaintiff's expectations for treatment may have been legitimate, I cannot conclude that defendants subjected plaintiff to cruel and unusual punishment when they failed to meet those expectations. The Constitution provides a remedy for inadequate medical care in only the most egregious circumstances. Some of plaintiff's conditions were serious, but his medical claims must be dismissed because he has not shown that defendants were deliberately indifferent to his needs.

C. Legal Mail

Inmates have a limited First Amendment right to be present when prison officials open their "legal mail." Bach v. People of the State of Illinois, 504 F.2d 1100 (7th Cir. 1974). In the order granting plaintiff leave to proceed on this claim, I assumed that a letter from a state representative could be considered legal mail. In addition, I wrote: "If petitioner

can prove that his mail was clearly labeled as a letter from a public official, that a prison official opened, read and copied the letter *intentionally* outside petitioner's presence *and* that the letter was a 'personal communication' to petitioner and not just 'junk mail,' this may be sufficient to show a violation of the First Amendment." January 28 Op. and Order, dkt. #2 at 17.

Plaintiff has failed to adduce any evidence that the letter was clearly labeled, that it was opened intentionally or that the letter was a personal communication. In his proposed findings of fact, plaintiff writes: "Officers at W.S.P.F. have a habit and possibly a policy or at the very least a practice of opening restricted mail addressed from lawyers/state representatives." Plt's PFOF, dkt. #90, at 21, ¶210. However, his only support for this allegation is an inmate complaint that he filed and an affidavit from Leonard Avery, who avers that he was once given a letter addressed to plaintiff from "Sonnenschien, Nath and Rosenthal."

The inmate complaint shows only that plaintiff complained about his mail being opened; it does not imply that there is a policy or practice at the Secure Program Facility of opening legal mail outside the presence of the inmates. Similarly, Avery's affidavit shows at most that, in one instance, another inmate saw a letter addressed to plaintiff from a law firm. It would not support a finding that *defendants Bast, Berge or Huibregtse* were opening plaintiff's legal mail, that they did so intentionally or that the letter plaintiff received from

a state representative was a personal communication. Accordingly, defendants' motion for summary judgment will be granted with respect to this claim.

ORDER

IT IS ORDERED that plaintiff Harrison Franklin's motion for sanctions is DENIED. FURTHER IT IS ORDERED that the motion for summary judgment filed by defendant Pamela Bartels and the motion for summary judgment filed by defendants Gary McCaughtry, Gerald Berge, Paulino Belgado, Bruce Siedschlag, Peter Huigbregtse, Linda Hoddy-Tripp, Jim Wegner, Bonnie Lind, John Grahl, Dan Meehan, Michael Glamann, Holly Meier, Todd Bast and Steven Schueler are GRANTED. The clerk of court is directed to enter judgment in favor of all defendants and close this case.

Entered this 3rd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge