IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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REGGIE TOWNSEND,

OPINION AND ORDER

Plaintiff,

05-C-204-C

v.

LARRY FUCHS and JERRY ALLEN,

Defendants.

- -

This is a civil action for monetary relief in which plaintiff Reggie Townsend, an inmate at the New Lisbon Correctional Institution, contends that he was placed in temporary lock-up on November 15, 2004, following a riot at the institution and held there for 63 days in intolerable conditions that violated the Eighth Amendment and without due process in violation of his Fourteenth Amendment constitutional rights. Earlier in this lawsuit, I considered defendant Fuchs's motion for partial summary judgment and granted it after finding that no evidence existed from which a reasonable jury could conclude that defendant Fuchs knew that plaintiff was sleeping on a wet mattress in temporary lock-up or that he was personally involved in forcing defendant to sleep on a wet mattress.

Presently before the court is the parties' second motion for summary judgment

addressing the questions whether defendant Allen violated plaintiff's Eighth Amendment rights by subjecting him to conditions of confinement in temporary lock-up that shock the conscience and whether defendant Fuchs violated plaintiff's due process rights by placing him or retaining him in temporary lock-up without sufficient procedural protections. Defendants' motion will be granted with respect to plaintiff's claim that defendant Allen violated his Eighth Amendment rights because plaintiff has adduced no evidence that defendant Allen's mental state was consistent with deliberate indifference, as required to prove such a claim. Defendants' motion with respect to plaintiff's due process claim will be granted because plaintiff did not have a liberty interest in avoiding placement or retention in temporary lock-up.

On December 13, 2006, after briefing on summary judgment was complete, plaintiff filed a motion to amend his complaint for a third time in order to add New Lisbon Correctional Institution warden Catherine Farrey as a defendant. In support of his motion, plaintiff argues that Farrey was the "ultimate decision-maker at NLCI during the sixty-three days Townsend was confined in TLU," involved in denying plaintiff his due process rights and deliberately indifferent to plaintiff's placement in conditions that violated the Eighth Amendment. For the reasons discussed below, plaintiff's motion will be denied. Federal Rule of Civil Procedure 15(a) permits a party to amend its pleadings by leave of court "when justice so requires." Although leave to amend should be "freely given," it may be denied for

a number of reasons, including undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party and futility. Chavez v. Illinois State Police, 251 F.3d 612, 632 (7th Cir. 2001). Plaintiff's motion will be denied as futile (though, coming this late in the game, it could be denied as unduly prejudicial to defendants).

Plaintiff argues that Farrey should be added as a defendant on both of his claims because she was the "ultimate decision-maker" at the New Lisbon Correctional Institution. However, liability under § 1983 arises only through a defendant's personal involvement in a constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). In an action under § 1983 there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978); Gentry, 65 F.3d at 561. Therefore, Farrey may not be added as a defendant in her supervisory capacity.

In any event, it would be futile for plaintiff to add Farrey, because I have determined that plaintiff did not have a liberty interest in avoiding placement and retention in temporary lock-up and plaintiff has not alleged sufficient facts to show that Farrey was deliberately indifferent to the conditions of plaintiff's confinement.

Plaintiff's argument regarding Farrey's personal involvement in the Eighth

Amendment violations mirrors his argument regarding defendant Allen. He asserts that Farrey knew about the circumstances that led to plaintiff's mattress becoming wet and moldy and did nothing to alleviate them. For reasons discussed in detail below, this is insufficient to demonstrate deliberate indifference under the Eighth Amendment. Because plaintiff's claims against Farrey would not survive a motion for summary judgment, his motion to amend the complaint will be denied as futile. See, e.g., Bethany Pharmacal Co. v. QVC, Inc., 241 F.3d 854, 860 (7th Cir. 2001) ("An amendment is futile if the added claim could not survive a motion for summary judgment.").

Unfortunately, more comments about the parties' proposed findings of fact are required before I set out the facts. In deciding the first motion for summary judgment, I advised the parties that I had disregarded proposed findings of fact that were phrased in terms of what a party admitted or testified to at deposition or in answer to interrogatories. Not only are such proposed facts immaterial, but it is impossible for the court to sort out whether the opposing party's admission to the proposed fact is simply an admission that a party testified or an admission to the truth of the underlying matter. I explained that the preferred and correct way to state proposed findings of fact is to eliminate the preface in a statement such as "so and so testified that the carpet was red" and simply state the relevant fact: "The carpet was red." This effort to educate counsel on the appropriate way to propose findings of fact seems to have had little effect. The parties' proposed facts are replete with

suggested findings that begin, "Townsend asserts" or "Documents used by Townsend's attorneys at his deposition established" or "Townsend has admitted" or "Townsend did not identify [so and so at his deposition] as an individual having knowledge of. . . ." Because these proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, again it was not possible to interpret the responses so as to find as fact matters that may otherwise have been relevant to a determination of the issues on their merits. Accordingly, I disregarded all of the facts so proposed.

I understand that different courts employ different standards of receiving factual information from the parties. However, in this court, the lawyers are expected to read this court's summary judgment procedures carefully and pay attention to them.

In this case, counsel not only proposed numerous facts in which the subject of the factual statement was the witness and the action was the fact of his or her testimony, but plaintiff proposed a series of "facts" in sections titled "The Following Proposed Findings of Fact Relate to Facts in Dispute" and "Additional Proposed Findings of Fact and Matters in Dispute." Included among the purported disputed statements are not only statements beginning "so and so testified," but statements such as "Capt. Roy Boutin is retired and lives in Florida and has not yet been deposed," and "Defendants have not produced any record of [an interview]." I am baffled by this recitation of facts, the vast majority of which are not material to the facts this court needs to understand in order to decide the motion for

summary judgment.

The issues to be decided are whether plaintiff was entitled to procedural due process before or at any time during the time he was placed in temporary lock-up and whether the conditions of temporary lock-up were so deplorable as to violate the Eighth Amendment. To reach a decision, the court must learn from the parties' proposed facts the circumstances surrounding plaintiff's placement in temporary lock-up, how long he stayed there, what his physical conditions were, who knew about them, what their response was to them and whether plaintiff had any kind of notice or opportunity to be heard on these matters . These are the relevant facts. They concern what happened between the parties *before* the lawsuit was filed. The actions the lawyers for the parties are taking or have taken to learn the facts are wholly immaterial to the decision.

The court's summary judgment procedures are designed to allow one party to propose a fact and the other party to put it into dispute, if the party can. If the court finds a material fact is disputed, the summary judgment inquiry will end and the parties will go to trial. If the disputed facts are not material, they should not be proposed. Despite the totally confusing nature of plaintiff's proposed "disputed facts," counsel for defendants attempted to respond to each one as this court's procedures require. In some instances, the response has been "no dispute." Therefore, I have sifted through the proposed "disputed" facts to determine whether any fact material to the decision on summary judgment is indeed

disputed. I conclude that none is. Therefore, the case is ready for resolution on summary judgment.

To make it clear, factual information concerning an incident that has given rise to a lawsuit and that has been learned during the deposition of a party or witness is fair fodder for proposed findings of fact. However, the information to be presented in the proposed fact is the testimony itself, that is, the witness's story of what happened, told in the voice of the witness and not in the voice of the lawyer. The only appropriate reference to the witness's deposition is the citation following the statement indicating the page and paragraph of the witness's deposition in which the statement may be found.

The final problem with the proposed findings of fact relating to this motion is that neither party proposed facts describing who the parties are, precisely when the incident at issue in this case occurred or what precipitated the incident. Apparently the parties assumed this court would fill in factual voids with facts found in connection with defendant Fuchs's first motion for partial summary judgment. This assumption is borne out by a review of the paragraph numbers used by the parties in their proposed findings of fact, which begin with numbers "30" and "90," respectively. Although I had no obligation to do so, I have included certain undisputed facts found in this court's opinion and order of May 9, 2006, so as to relate a complete narrative of events.

Despite these criticisms of the proposals of fact, I express my appreciation to

plaintiff's counsel for accepting the responsibilities of representing plaintiff at their own expense.

From the parties' proposed findings of fact, and the facts found to be undisputed in this court's order of May 9, 2006, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Reggie Townsend has been incarcerated at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, since June 22, 2004.

Defendant Larry Fuchs has been employed by the Wisconsin Department of Corrections as Security Director at New Lisbon since November 15, 2004. In that capacity, his duties include insuring the safety and security of inmates and staff at the institution; developing, implementing and modifying the institution's security program; directing day-to-day security operations; collaborating with Department of Corrections officials and state and local law enforcement officials with respect to security matters; assuming direction of the institution in the absence of the warden and deputy warden; and implementing affirmative action and civil rights compliance plans.

Temporary lock-up is a form of administrative segregation. Inmates placed in temporary lock-up live in the same conditions as inmates placed in punitive forms of

segregated confinement. However, unlike inmates in punitive segregation, inmates in temporary lock-up continue to receive pay, do not lose good time credits and do not receive extensions of their sentences.

The New Lisbon Correctional Institution has 52 cells in its segregation unit. Forty-six of the cells are regular cells and six cells are for observation. Each segregation cell contains one bunk, sink, toilet and shower with a drain on the floor. The placement of these items is the same in all segregation cells. Water from the shower sprays to an area beyond the drain before draining through the floor. It hits the walls and cell floor before draining. The showers are not positioned in the cells to punish inmates. When inmates are double-celled, one inmate must sleep on a mattress on the floor. Regardless whether an inmate sleeps on the floor or on the bunk, he is provided with clean bedding materials and linens. Inmates in segregation are given the opportunity to clean their cells three times each week.

On November 11, 2004, a riot broke out in Unit A at New Lisbon. Numerous inmates attacked staff on the unit and other staff that responded to the emergency. At least one inmate assaulted staff members with a lock he placed in his sock. More than a dozen staff members were injured. Officials believed the Vice Lords gang was involved in the riot. (Plaintiff is not a member of this gang; he used to be a member of the Gangster Disciples, a rival gang.) After the riot, Warden Catherine Farrey suspended all rules at New Lisbon until November 30, 2004. Inmates thought to be involved in the riot, including those who

were in the area of the riot and those who disobeyed orders to return to their cells were placed under investigation and moved to temporary lock-up.

On November 15, 2004, plaintiff was placed in temporary lock-up pending an investigation to determine whether he was involved in the riot. The duration of his confinement in temporary lock-up was 63 days.

The number of inmates who were being investigated in connection with the riot was greater than the number of available segregation cells. As a result, some of the inmates had to be double-celled. Plaintiff was double-celled with an inmate named Larry Gibson.

On the day plaintiff was placed in temporary lock-up, he was given two DOC 67 forms titled "Notice of Offender Placed in Temporary Lock-up." One of the forms was signed by Captain Cooper and one was signed by Lt. Danhke. On the form signed by Lt. Danhke, under the section titled "Facts," Danhke wrote, "pending investigation of staff battery." On the form signed by Captain Cooper under the section titled, "Facts Upon Which Decision Is Based," Cooper wrote, "Inmate placed on the status pending an investigation into potential physical altercation." In the section marked, "Reasons for Placement," Cooper checked a box stating, "The offender may impede a pending investigation." The DOC 67 forms contain a section titled, "Offender's Statement in Response to Reason(s) for Placement and Facts." Plaintiff wrote in this section on the Danhke DOC 67, "Inmate has no idea what they are talking about." On the Cooper DOC

67, plaintiff wrote, "I was just cleaning my room, I don't know where this came from. I was just cleaning my room, they said after they searched my room they let me go."

Evidence that an inmate was cleaning his cell following the November 11, 2004 riot at the New Lisbon Correctional Institution was highly suspicious and indicated that he may have been trying to clean up blood.

Defendant Fuchs was the security director at New Lisbon during the entire time that plaintiff was in temporary lock-up. As security director, defendant Fuchs was responsible for the security, health and safety of the state and inmates at the institution. Part of defendant Fuchs's job was reviewing and evaluating conduct reports and incident reports, implementing the due process system along with establishing directions and follow-up on all incident reports and coordinating all inmate investigations. As security director, defendant Fuchs was required to be familiar with the provisions of DOC 303. Fuchs knew that DOC 303 required that an inmate placed in temporary lock-up be informed of the charges against him and receive a periodic review of his confinement in temporary lock-up and he was responsible for conducting the periodic reviews. However, "the DOC 303" is not required when rules are suspended at the warden's direction. New Lisbon Correctional Institution administrative rules were suspended between November 11 and November 30, 2004, when plaintiff was first placed in temporary lock-up, making it unnecessary for defendants to review his placement during that time.

Defendant Fuchs, Deputy Warden Elizabeth Tegels and Warden Catherine Farrey extended plaintiff's confinement in temporary lock-up on eight separate occasions each for a seven-day period by signing a form titled "Review of Offender in Temporary Lock-up." The only reasons given on the review forms for plaintiff's continued confinement were, "retain pending investigation" or "pending investigation of NLCI inmates and disturbance that occurred on 11/11/04." Although he signed five of the extension reviews, defendant Fuchs knew only that plaintiff was in temporary lock-up pending an investigation. He did not know why plaintiff had been placed in temporary lock-up to begin with, who had placed him there, the status or timing of the investigation or when the investigation might be completed. Plaintiff's confinement was never reviewed by anyone outside of the institution.

The cells in the segregation unit at the New Lisbon Correctional Institution are known as "wet cells." For the 63-day period plaintiff was confined in the segregation unit in temporary lock-up, plaintiff and his cellmate each had 39 square feet of living space, almost all of which was taken up by a bunk and floor mat, a toilet and a shower. During this same period, plaintiff was allowed to leave his cell two or three times to visit Health Services.

New Lisbon Correctional Institution segregation unit logs for this period indicate that recreation was cancelled on 12 days during the 63 days plaintiff was there. In addition, the segregation handbook indicates that outside recreation will not occur if temperatures are below 32 degrees. Plaintiff would have been allowed to go to recreation on the days that

weather did not cause cancellation.

While he was in temporary lock-up, plaintiff was not permitted to have meals in the common dining facility and was required to eat in his cell. His possession of personal property was restricted as well.

During the 63 days plaintiff was confined in the segregation unit, his visiting privileges were restricted. The segregation handbook indicates that inmates in temporary lock-up are allowed one visit a week. However, plaintiff was not allowed face-to-face visits. Instead, all visits were conducted by remote video connection. Plaintiff could communicate with correctional staff while he was in temporary lock-up when staff did their rounds or through the intercom system in an emergency or through letters, interview requests or the inmate complaint system. About one week into his confinement in temporary lock-up, plaintiff was interviewed by someone.

Defendant Allen has been employed at New Lisbon Correctional Institution since approximately February of 2004. He spent eight hours a day in the segregation unit and was normally the highest ranking officer in the unit on his shift. Allen was responsible for the day-to-day running of segregation and made daily rounds of the segregation unit. He knew that although the segregation cells had been designed to house only a single inmate, most of the cells housed two inmates, one of whom had to sleep on the floor. He knew that the temporary lock-up inmates were being held in "wet cells" and that it was possible for the

bedding on the floor to get wet.

Defendant Allen knew that inmates had to use the video system for visitation, that inmates in segregation ate meals in their cells instead of with other inmates and that inmates were in temporary lock-up significantly longer than they would be under normal circumstances. Allen considered cell doubling in segregation to the problem of holding a large number of prisoners in segregation. He recognized that showering in a room without a shower curtain would get the room wet. He recognized as well that it is unhealthy to sleep on a wet and moldy mattress and that sleeping on such a mattress would put one at risk of getting sick. New mattresses were readily available. Defendant Allen toured the segregation unit every day and looked in on plaintiff.

Plaintiff's prison sentence was not extended as a result of his being placed in temporary lock-up.

DISCUSSION

A. Due Process

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. A procedural due process claim against government officials requires proof of inadequate procedures as well as interference with a liberty or property interest. Kentucky Dept. of Corrections v.

Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." In the prison context, these protected liberty interests are essentially limited to the loss of good time credits or placement for an indeterminate period of time in one of this country's super-maximum security prisons, such as the Wisconsin Secure Program Facility. E.g., Wilkinson v. Austin, 545 U.S. 209, 223-224 (2005). In other words, liberty interests are implicated when a prisoner's sentence is prolonged or he is subjected to conditions that are not the typical ones encountered by prisoners. In the absence of a liberty interest, "the state is free to use any procedures it chooses, or no procedures at all." Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001).

Generally speaking, placement in temporary lock-up or administrative segregation does not give rise to a liberty interest. Sandin, 515 U.S. at 486; Hewitt v. Helms, 459 U.S. 460, 468 (1983) ("Administrative segregation is the sort of confinement that inmates should reasonably anticipate."); Lekas v. Briley, 405 F.3d 602, 609 (7th Cir. 2005) ("[I]n every state's prison system, any member of the general prison population is subject, without remedy, to assignment to administrative segregation or protective custody at the sole discretion of prison officials."); Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997);

Crowder v. True, 74 F.3d 812, 815 (7th Cir. 1996) (holding that placement of prisoner in nondisciplinary segregation for three months did not constitute deprivation of liberty interest); Meriwether v. Faulkner, 821 F.2d 408, 414 (7th Cir. 1987) ("Given the broad uses of administrative segregation . . . inmates should reasonably anticipate being confined in administrative segregation at some point during their incarceration."). However, plaintiff was granted leave to proceed on this claim because I found that there might be some limited circumstances in which the conditions of temporary lock-up were either (1) so unusual and severe as compared to those experienced by the general prison population in Wisconsin to constitute an "atypical and significant hardship"; or (2) analogous to those at issue in Wilkinson.

I understand plaintiff to contend that the following aspects of his confinement were atypical and significant: (1) he was "double-celled" with another inmate in a 6.5 by 12 foot cell; (2) he was forced to eat meals in his cell; (3) he had to sleep on the floor on a wet mattress; (4) his visitation and property rights were restricted; and (5) he was denied out-of-cell recreation. In his brief, plaintiff argues that these conditions were much worse than those experienced by prisoners who were in the general population at the New Lisbon Correctional Institution. Plaintiff attempts to support this argument with several charts prepared by his expert, Dr. Charles Montgomery. However, even if this is the correct baseline for comparison (and it is not clear that it is, see Westefer v. Snyder, 422 F.3d 570,

590 (7th Cir. 2005)), plaintiff did not include any information from Montgomery's expert report in his proposed findings of fact. Thus, any comparisons between the conditions in the general living areas and temporary lock-up at the New Lisbon Correctional Institution would require the court to consider facts not in the record. Moreover, many of the conditions about which plaintiff complains have previously been found not to give rise to a liberty interest. For example, in Thomas v. Ramos, 130 F.3d 754, 756 (7th Cir. 1997), the Court of Appeals for the Seventh Circuit found that a prisoner who was placed in disciplinary segregation for 70 days, confined to a small cell with another prisoner and denied out-of-cell recreation had not experienced an atypical and significant hardship.

Alternatively, plaintiff argues that the conditions he experienced in temporary lock-up are analogous to those experienced by the prisoners in Wilkinson, 545 U.S. 209, in which the Supreme Court found that the conditions constituted an atypical and significant hardship compared to any plausible baseline. However, a comparison of the conditions plaintiff complains of and those experienced by the plaintiffs in Wilkinson reveals several critical differences. First, plaintiff was not placed in temporary lock-up for an indefinite amount of time. In the end, he spent just over two months in temporary lock-up. His placement did not exceed the duration of his sentence and was never intended to do so. Rather, plaintiff was locked up for a limited period of time while prison officials investigated a serious prison riot. Next, the most onerous aspects of the conditions of confinement

considered in Wilkinson were "extreme isolation" and deprivation of almost every form of stimuli. Westefer, 422 F.3d at 586. If anything, plaintiff experienced too much human interaction with his cell mate. Finally, neither side has suggested that plaintiff's placement affected his parole eligibility in any way. Although the conditions that plaintiff experienced in temporary lock-up were unpleasant, they do not lend themselves to ready comparison with the conditions found atypical and significant in Wilkinson.

There may be rare circumstances where conditions of confinement constitute an "atypical and significant hardship" yet fall short of violating the Eighth Amendment's prohibition on cruel and unusual punishment. However, this is not one of them. Plaintiff did not have a liberty interest in avoiding placement in temporary lock-up for 63 days; therefore, he was due no process before or during this placement. Defendants' motion for summary judgment will be granted with respect to plaintiff's due process claim.

B. Eighth Amendment

As discussed previously in this court's May 9, 2006 Opinion and Order granting defendant Fuchs's motion for partial summary judgment, the Eighth Amendment's prohibition of "cruel and unusual punishment" establishes the minimum standard for the treatment of prisoners by prison officials. In Rhodes v. Chapman, 452 U.S. 337, 347 (1981), the Supreme Court stated that conditions in prison "must not involve the wanton

and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." An inmate alleging that the conditions of his confinement fall below the standard imposed by the Eighth Amendment must prove two things. First, he must establish that the conditions were objectively serious. That is, he must show that they deprived him of "'basic human needs' or 'the minimal civilized measure of life's necessities.'" Antonelli v. Sheahan, 81 F.3d 1422, 1427 (7th Cir. 1996) (quoting Rhodes, 452 U.S. at 347)); Gillis v. Litscher, 468 F.3d 488, 493 (7th Cir. 2006) (noting that "life's necessities" include shelter and adequate bedding). Second, he must prove that the prison official or officials responsible for the conditions acted with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 302 (1991). In Wilson, 501 U.S. at 303, the Court held that the deliberate indifference standard applies to conditions of confinement claims under the Eighth Amendment as well to as inadequate medical care claims.

The parties do not discuss in their briefs whether being forced to sleep on a wet and moldy mattress for 63 days is sufficiently serious to satisfy the first prong of the Eighth Amendment inquiry. I surmise from their silence on this matter that the parties agree that it would be. This agreement leaves only the question whether defendant Allen was deliberately indifferent to the conditions in which plaintiff was confined in temporary lock-up. As I noted previously, the Supreme Court has stated that "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." Farmer v. Brennan, 511 U.S. 825, 837 (1994). "Knowledge of a risk can be shown if an official was exposed to information from which the inference could be drawn that a substantial risk exists, and he or she also draws the inference." Pierson v. Hartley, 391 F.3d 898, 902 (7th Cir. 2004). Also, a jury may infer that a prison official knew of a risk if it was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk." Farmer, 511 U.S. at 842.

Plaintiff argues that this case is about more than defendant Allen's knowledge of a wet, moldy mattress and instead about defendant Allen's awareness of the general conditions that plaintiff experienced while in segregation. However, defendant Allen's knowledge of the general conditions experienced by plaintiff is not the relevant inquiry in this case, under either the Eighth Amendment or this court's order screening plaintiff's claims. Plaintiff was denied leave to proceed on claims regarding restrictions on outdoor exercise and his "double celling" with another prisoner. As a result, the narrow question presented here is whether defendant Allen was deliberately indifferent to plaintiff's "basic human need" for adequate bedding. Therefore, it is important to focus only on the facts regarding defendant Allen's knowledge of the condition of plaintiff's mattress. The facts reveal that defendant Allen toured the segregation unit every day and looked in on plaintiff. He knew that when two

prisoners were placed in a segregation cell, one had to sleep on the floor. In addition, he knew that prisoners in temporary lock-up were being held in "wet cells" and that it was possible for the bedding on the floor to get wet as a result of prisoners showering in the room without a shower curtain. Finally, the facts reveal that defendant Allen understood that it is unhealthy to sleep on a wet and moldy mattress and that sleeping on such a mattress would put one at risk of getting sick. Thus, plaintiff has proposed facts suggesting that defendant Allen *could* have drawn the inference that plaintiff was sleeping on a wet or damp mattress. However, he has adduced no evidence to suggest that he actually did so. Indeed, plaintiff has proposed no facts to show that he complained about his mattress to defendant Allen, that he asked defendant Allen for a replacement because his mattress was wet or foul-smelling or that the circumstances were such that a jury could find that defendant Allen was aware of the level of deterioration in the condition of plaintiff's mattress. For example, neither party has proposed that moldy, water-saturated mattresses were a pervasive problem known to defendant Allen and others in the segregation unit. It is not enough for plaintiff to produce evidence that defendant Allen could have or should have drawn the inference that plaintiff's mattress was wet and moldy; "negligence on the part of an official does not violate the Constitution, and it is not enough that he or she should have known of a risk." Pierson, 391 F.3d at 902.

Because plaintiff has adduced no evidence that defendant Allen's mental state was

consistent with deliberate indifference, an essential element of his claim, summary judgment may be entered for defendant Allen. E.g., Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (holding that non-moving party bears burden of "establish[ing] the existence of an essential element on which it would bear the burden of proof at trial.") Plaintiff argues that the inquiry whether defendant Allen acted with deliberate indifference is a factual one that is not amenable to a decision on a motion for summary judgment and instead must be reserved for resolution by a jury. Not so. To defeat a motion for summary judgment a party must show that he has sufficient evidence to create a genuine issue of material fact. Such a genuine issue of material fact exists "only if there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Baron v. City of Highland Park, 195 F.3d 333, 338 (7th Cir. 1999) (citing Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986)). At this stage of the proceedings, plaintiff has failed to show that he has sufficient evidence to put into dispute the material fact of defendant Allen's state of mind. He cannot wait for the trial in hopes of coming up with such evidence. This is the time at which he must make that showing. Schacht v. Wisconsin Department of Corrections, 175 F.3d 497, 504 (7th Cir. 1999).

ORDER

IT IS ORDERED that

1. Plaintiff's motion to amend his complaint to add New Lisbon Correctional Institution warden Catherine Farrey as a defendant is DENIED.

2. The motion for summary judgment of defendants Larry Fuchs and Jerry Allen is GRANTED.

3. The clerk of court is directed to enter judgment in favor of both defendants and close this case.

Entered this 29th day of January, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge