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

REGINALD A. MOTON,

Plaintiff,

v.

GREGORY GRAMS, JANEL NICKEL, DYLON RADTKE, LORI ALSUM, DALIA SULIENE AND DARCI BURRESON,

Defendants.

OPINION AND ORDER

10-cv-666-slc

Plaintiff Reginald A. Moton filed a civil rights complaint under 42 U.S.C. § 1983, alleging that he was attacked by another inmate, denied adequate medical care for his injuries, and convicted of false disciplinary charges stemming from the altercation, which occurred on April 13, 2010 at the Columbia Correctional Institution. After screening the complaint, dkt. 11, this court allowed Moton to proceed with claims that defendants Gregory Grams and Janel Nickel failed to protect him from harm in violation of the Eighth Amendment, that defendants Darci Burreson, Dalia Suliene and Lori Alsum denied Moton adequate medical care in violation of the Eighth Amendment, and that defendants Dylon Radtke and Alsum violated Moton's right to due process during a disciplinary proceeding. Before the court is a joint motion for summary judgment filed by the defendants. *See* dkt. 29.

Because the record does not contain evidence showing that defendants Grams and Nickel failed to protect Moton from a known risk of harm or that defendants Burreson, Suliene and Alsum were deliberately indifferent to Moton's serious medical needs, I conclude that these defendants are entitled to summary judgment on Moton's Eighth Amendment claims.[1] Likewise, because the record does not contain evidence showing that a due process violation occurred in connection with Moton's disciplinary proceeding, I conclude further that defendants Radtke and Alsum are entitled to summary judgment on these claims.

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[1] As a point of information, today I also am issuing a summary judgment order in *Olson v. Morgan,* 11-cv-281-slc, another case involving claims that CCI staff failed to protect an inmate.

Let's start with a procedural point: in September 2011, Moton received from this court instructions on how to file submissions related to summary judgment. *Procedure to be Followed on Motions for Summary Judgment*, attached to the pretrial conference order, dkt. 27. As explained in those instructions, if a defendant files a motion for summary judgment, then the plaintiff is to file a response to the defendant's proposed findings of fact, a brief with opposing legal arguments and evidentiary materials that support plaintiff's fact responses and proposals. *Procedure*, § II.A.1-3. The plaintiff is supposed to propose each fact in a separate paragraph and support each fact by referring to the evidence he had submitted in support. *Procedure*, § II.D.1-2.

Moton has filed a response to the defendants' summary judgment motion, along with a set of proposed findings. *See* dkt. 40. The defendants have filed a reply. *See* dkt. 46. Moton, however, has not responded to all of the defendants' proposed findings of fact. Therefore, under the doctrine of *expressio unius exclusio alterius est,*[2] I conclude that certain facts proposed by the defendants are undisputed to the extent that they are supported by admissible evidence. *Doe v. Cunningham*, 30 F.3d 879, 883 (7th Cir. 1994); *Strong v. Wisconsin*, 544 F. Supp. 2d 748, 759-60 (W.D. Wis. 2008). Likewise, where Moton *did* file responses to defendants' proposed findings of fact, often he offered only his own conclusory assertions without citing to any admissible evidence in the record to support those assertions. Those responses have been disregarded. *Procedure*, § II.E.2 ("The court will not consider any factual propositions made in response to the moving party's proposed facts that are not supported properly and sufficiently by admissible evidence.").

Against this backdrop, from the evidence and the parties' proposed findings of fact I find the following facts to be material and undisputed:

[2] A legal maxim that loosely translates in this context as "if you object to only some parts of a group of proposals, then the court assumes that you are not objecting to the others."

FACTS

At all times relevant to this action, Moton was an inmate in the Wisconsin Department of Corrections (DOC) at the Columbia Correctional Institution (CCI) in Portage, Wisconsin. The incident that forms the basis of Moton's complaint occurred at CCI on April 13, 2010. At that time, Gregory Grams was CCI's warden; Janel Nickel was the security director; Dylon Radtke was a supervisory officer (captain); Lori Alsum was the health services manager; Dalia Suliene was a physician and Darci Burreson was a nurse clinician.[3]

I. Moton's Claim That Grams and Nickel Failed to Protect Him from Assault

Moton's complaint stems from an incident in which he was assaulted by another inmate named Samuel Upthegrove.[4] Moton alleges that Upthegrove, who had a "history of violence" while in prison, instigated the altercation, which escalated into a fistfight.

Upthegrove had arrived at CCI on August 3, 2009, transferred from the Waupun Correctional Institution (WCI). CCI is a maximum security institution that houses a large number of inmates with mental illness and a high percentage of inmates with assaultive histories. Inmates with assaultive histories are housed at CCI due to the physical plan of the institution, which was designed to afford clear lines of sight to provide staff the ability to closely monitor

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[3] It appears that Nickel is the only defendant who remains assigned to CCI. Warden Grams retired from DOC in April 2011. Since 2011, Radtke has been employed as Security Director for the Kettle Moraine Correctional Institution. Alsum is now employed by DOC, Bureau of Health Services as a Nursing Coordinator. Burreson worked for DOC from July 2006 until November 2010, but is no longer employed by the State of Wisconsin.

[4] Moton listed Upthegrove as a defendant in his complaint. In a March 15, 2011 screening order, the court denied Moton leave to proceed with his claims against Upthegrove because Upthegrove was not acting under color of state law for purposes of liability under 42 U.S.C. § 1983. Dkt. 11. In that same order, the court also dismissed claims against a psychological services supervisor (Dr. Curt Schwebke), two correctional officers (Sergeant Timm and Officer Grant), an investigator with the Columbia County Sheriff's Department (Detective Anthony Belay) and several other prison administrative staff members (Mary Leiser, Joanna Lane, Amy Mallard, John Doe and Jane Doe), after finding that Moton failed to state an actionable claim against these individual defendants.

the population. In comparison to other maximum security facilities within DOC, CCI has smaller populations in the housing units and all inmate movement is controlled by pass or staff escort further to minimize any safety risk.

Most inmates who are transferred to CCI go through an intake process, which includes a medical and clinical evaluation, as well as consideration by security staff for special placement needs, if any. During Upthegrove's intake evaluation CCI officials noted that Upthegrove had committed nine assaults at WCI between August 2007 and February 2008. Upthegrove's conduct reports reflect that he instigated a fight with another inmate in August 2007 and attacked an officer in December 2007. On seven other occasions during this time, Upthegrove engaged in disruptive conduct and "battery" by spitting or throwing other bodily fluids on officers and staff.[5]

After completing CCI's intake process, Upthegrove was placed in a disciplinary segregation unit as punishment for his record of misconduct toward DOC personnel. CCI has three segregation units: DS-1, DS-2 and HU-7. DS-1 is the most secure segregation unit where an inmate may go when he is first put into segregation, or is having behavioral problems that require "control status or clinical observation status." DS-2 is a transitional segregation unit, where an inmate will go when he has been in DS-1 and has demonstrated that he can maintain appropriate behavior or does not require the heightened security level found in DS-1. HU-7 is a segregation unit that mainly houses vulnerable inmates and the mentally ill. Upon his arrival at CCI on August 3, 2009, Upthegrove was placed in DS-1.

CCI does not house inmates in disciplinary confinement indefinitely. Upthegrove's term of disciplinary confinement was set to expire at some point in March 2010. As security director,

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[5] It appears that Upthegrove was convicted in at least two criminal proceedings for throwing or expelling bodily substances on prison staff. *See State v. Moton*, Dodge County Circuit Court No. 07CF432 and No. 08CF72.

defendant Nickel was responsible for deciding where to place Upthegrove upon his release from disciplinary segregation. Nickel had two options: general population or "administrative confinement," which is a non-punitive form of segregation reserved for inmates whose presence "poses a serious threat to life, property, self, staff or other inmates, or to the security or orderly running of the institution." Wis. Admin. Code DOC § 308.04(1).

Similar to disciplinary segregation, placement in administrative confinement is temporary and subject to specific criteria. An inmate may be placed in administrative confinement for any of these reasons:

> (a) The inmate presents a substantial risk to another person, self, or institution security as evidenced by a behavior or a history of homicidal, assaultive or other violent behavior or by an attempt or threat to cause that harm;
>
> (b) The inmate's presence in the general population poses a substantial risk to another person, self or institution security;
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> (c) The inmate's activity gives a staff member reason to believe that the inmate's continued presence in general population will result in a riot or a disturbance;
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> (d) The inmate has been identified as having an active affiliation with an inmate gang or street gang or there are reasonable grounds to believe that the inmate has an active affiliation with an inmate gang or street gang; and there is a reason to believe that the inmate's continued presence in general population will result in a riot or a disturbance.
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> Wis. Admin. Code DOC § 308.04(2).

An inmate may be placed in administrative confinement only after a review by the Administrative Confinement Review Committee (ACRC), which requires notice to the inmate and an opportunity to be heard. Wis. Admin. Code DOC § 308.04(3)-(4).

Reviewing Upthegrove's record of misconduct, defendant Nickel considered whether administrative confinement was appropriate for Upthegrove upon his release from disciplinary

segregation. Nickel noted that Upthegrove's last known act of assault had occurred in February of 2008, about 17 months before his transfer to CCI. Nickel also noted that Upthegrove had a short prison sentence and that he would benefit from rehabilitative "programming to aid in his transition to the community." She was aware that if CCI placed Upthegrove in administrative confinement, then he would not be eligible for this type of programming. Nickel also was aware that, if CCI assigned Upthegrove to the general population, it could designate him as requiring a single cell.

All inmates are reviewed to determine if they require a single cell. An inmate may be assigned to a single cell based due to security issues or medical, psychological or clinical needs. In that regard, if an inmate is particularly vulnerable, handicapped, suicidal, or involved in a high profile case, has special needs or is notably assaultive, that inmate will be designated as either requiring a single cell or designated as a "pair with care." Single cells also may be designated to meet an inmate's need for separation due to inappropriate behavior or for transition periods (allowing an inmate a single cell in general population after a very long segregation period to get used to being back in general population).

Ultimately, defendant Nickel decided not to refer Upthegrove to the ACRC for possible placement in administrative confinement. Instead, Nickel approved Upthegrove for release to the general population in a single cell. After Nickel made this determination, an administrative captain assigned Upthegrove to Housing Unit 4, Cell 39, on February 5, 2010. Three days later, on February 8, 2010, a unit manager moved Upthegrove to Cell 42, next to Moton, who was assigned to Cell 41.

Moton and Upthegrove resided in adjacent cells without incident or complaint for over two months, until April 13, 2010. At approximately 11:30 a.m. that day, an officer working in the control booth for Housing Unit 4 opened the cell doors to allow inmates out for lunch. Without any apparent provocation, Upthegrove entered Moton's cell and attacked him from

behind. Moton's cellmate witnessed the attack. Using a home-made shank honed from a toothbrush, Upthegrove, who is 5'10" and 175 pounds repeatedly stabbed Moton, who is 6'4" and 240 pounds, in the upper back and neck. Moton responded by placing Upthegrove in a headlock and taking him to the ground. While Moton held Upthegrove on the ground, Upthegrove bit Moton on the left arm. Moton responded by punching Upthegrove repeatedly in the face.

When security officers arrived at the cell, Moton was still on top of Upthegrove. One of the officers who was present observed Moton hit Upthegrove "two to three or four times" as he was coming down the hall, but "[he] did not see [Upthegrove] biting [Moton]" while Moton was hitting him. After Moton allegedly disobeyed orders to stop punching Upthegrove, officers forcibly subdued both inmates and took them to temporary lock-up (TLU) in the disciplinary segregation building pending CCI's investigation into their fight.

II. Moton's Claim that He was Denied Adequate Medical Care

Before taking Upthegrove and Moton to TLU, the officers brought them to the Health Services Unit (HSU) for examination and treatment. Upthegrove reportedly sustained injuries consistent with being punched in the face with a closed fist.[6] Nurse Burreson (a defendant) examined Moton and found only two small wounds (approximately 5 mm. wide each) on his back which she described as very small and superficial. Burreson treated these wounds by cleaning the affected areas with "betasept and NaCl (salt water) solution," followed by a topical antibacterial ointment and bandages. According to Burreson, Moton did not report being bitten on the arm and did not advise her of any other injury. During her examination, Burreson did

[6] Upthegrove's medical records are privileged and have not been submitted to this court.

not observe any broken skin, lacerations or blood to indicate an obvious bite wound on Moton's arm and he did not require any further treatment on the day of the altercation.

The next day, April 14, 2010, Moton submitted a health services request for pain medication. Moton reported that his "upper back shoulder" was sore and he asked the Health Services Unit to examine his "[stab] wounds" again. On April 15, 2010, Moton asked to see the "treatment report" made by the nurse who treated him following the attack. On April 16, 2010, Moton submitted a health services request complaining of "pain in [his] back and shoulder." HSU staff scheduled an appointment for Moton with a physician on April 19, 2010, but Moton reportedly refused to come out of his cell to be seen. In a health services request form dated that same day, Moton explained that he was confused about his appointment because a correctional officer told him he had to submit a $7.50 co-pay to see a nurse. Another appointment was scheduled for April 22, 2010, but was rescheduled due to a tornado drill at the CCI facility.

On April 23, 2010, defendant Alsum reviewed Moton's request for a copy of the nurse's treatment report regarding his April 13 injuries. When Alsum checked Moton's medical records, she found no entry in his chart for any treatment on April 13, 2010. Alsum contacted Burreson, who explained that she was unable to locate Moton's chart before conducting her examination on April 13, 2010. Burreson, however, was able to locate her treatment notes and promptly updated Moton's records on April 23, 2010, marking them as a "late entry." HSU staff make every effort to enter medical exam notes in a timely manner, but sometimes staff make late entries due to human error, or the press of emergencies.

While still confined in TLU, Moton learned that he would receive disciplinary charges (which are summarized further below) as a result of his altercation with Upthegrove. On May 6, 2010, Moton received a regularly scheduled follow-up examination by a psychiatrist, who observed that Moton was "outraged" to receive disciplinary charges after he was attacked. That same day, Moton submitted a health service request complaining for the first time that

Upthegrove had bitten him during the April 13, 2010 assault. Moton requested a tetanus shot and asked that the bite mark be recorded in his medical file. Burreson conferred with a physician and responded that Moton did not require a tetanus shot because he had received one in 2007, and this vaccine was considered up to date. Burreson advised further that a tetanus shot was not needed because she was unaware of any bite injury during his assessment and the wounds on his back were superficial.

On May 13, 2010, defendant Suliene treated Moton in the HSU for complaints of back pain and a bite wound on his left arm. Dr. Suliene observed bruising from teeth on Moton's arm, but no broken skin and no infection as the result of a bite. There were no wounds visible on Moton's back. After Moton complained that the left side of his neck was stiff, Dr. Suliene prescribed Tylenol for pain and exercises to help with stiffness. She scheduled Moton for a followup visit in four weeks.

Moton continued to receive care for pain and stiffness. On May 26, 2010, Moton was treated by nursing staff in the HSU for continued complaints of neck pain. Dr. Suliene examined Moton the following day and prescribed a muscle relaxer (Flexeril), 10 mg. twice daily for 10 days for neck pain, stiffness and spasms. Dr. Suliene examined Moton again on June 7, 2010. Noting that Moton continued to complain of neck spasms, Dr Suliene increased the dose of Flexeril to 10 milligrams, three times a day, and prescribed a "pain reliever rub" for one month. She also ordered extra pillows for three months and scheduled followup appointment for Moton in two months.

On August 9, 2010, Dr. Suliene conducted a follow-up examination with Moton, who continued to complain of neck pain. Looking at Moton's neck x-rays, Dr. Suliene observed signs of degenerative joint disease in his cervical spine. After the examination, Dr. Suliene ordered a physical therapy evaluation for Moton's neck pain and continued his prescriptions, including NSAID pain medication and Doxepin, which is a muscle relaxant.

Moton received a physical therapy evaluation on September 17, 2010. The evaluation disclosed "deconditioning" and increased stiffness in Moton's "trapezious region" or upper back. On September 21, 2010, Dr. Suliene submitted a Class III request for six visits to a physical therapist for pain in Moton's right shoulder and tingling in his fingers. That request was approved the following day, on September 22, 2010. Moton began physical therapy for neck and shoulder pain on December 27, 2010. The record contains no additional complaints of shoulder or neck pain after this time.

III. Moton's Claim Concerning the Disciplinary Charges

Defendant Radtke was assigned to conduct an administrative investigation of the April 13, 2010 altercation between Moton and Upthegrove. During Moton's interview by the Columbia County Sheriff's Department (which also investigated the assault), Moton described being hit in the back several times by Upthegrove before he could wrestle Upthegrove to the ground. Moton reported that when Upthegrove bit him in the arm, he hit Upthegrove in the face approximately four times and did not stop hitting him until "after staff were there." Moton told the detective that he "did not know why" Upthegrove assaulted him because they were "okay with each other" before the altercation occurred. During the interview, the detective viewed photographs of the two "stab marks" on Moton's back and what appeared to be "bite marks" on one of Moton's forearms. Because it appeared that Moton was defending himself, the detective recommended filing charges of battery against Upthegrove as a result of this incident.

During DOC's investigation of this incident, defendant Radtke learned that before assaulting Moton, Upthegrove had contacted his mother by telephone and had obtained

information about Moton's criminal history.[7] Radtke concluded that Upthegrove had planned the assault, entered Moton's cell and had attempted to injure Moton. Radtke issued a conduct report against Upthegrove (Conduct Report #2035160), charging him with violating prison disciplinary rules against (1) battery; (2) possession, manufacture and alteration of weapons; and (3) entry of another inmate's quarters. Defendant Radtke also issued a conduct report against Moton (Conduct Report #2035161) based on Moton's admission that he did not immediately follow staff directives to stop punching Upthegrove in the face when staff arrived to quell the altercation. Radtke concluded that "it was more likely than not that Moton had Upthegrove on the floor and hit him repeatedly in the face with [a] closed fist in an attempt to injure Upthegrove after he had Upthegrove subdued." As a result, Radtke issued disciplinary charges against Moton for (1) battery; and (2) disobeying orders.

On May 4, 2010, Moton received written notice of the disciplinary charges against him. On May 5, 2010, Moton wrote a letter to Alsum asking why Burreson's treatment notes were not entered on his medical chart until after he requested a copy of the report. Burreson responded that she had made the late entry because she had been unable to enter the information on the day of treatment. Burreson advised Moton to notify HSU if he had any further questions.

On May 17, 2010, CCI held a formal disciplinary hearing on the charges against Moton. Moton, with the assistance of an advocate, called several witnesses, including his cellmate, who witnessed the altercation between Moton and Upthegrove. Moton also made a statement at the hearing, admitting that he hit Upthegrove twice after staff arrived. Moton explained that he did so only to get Upthegrove to stop biting Moton's arm. The adjustment committee found

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[7] Public records disclose that Moton was convicted of multiple counts of sexual assault, including sexual assault of a child. *See State of Wisconsin v. Moton*, 242 Wis.2d 470, 625 N.W.2d 359, 2001 WI App. 75 (Feb. 20, 2001) (unpublished). I include this information solely for narrative context.

Moton guilty of the battery charge and imposed 120 days of "disciplinary separation." Moton promptly filed an administrative appeal.

On June 24, 2010, Warden Grams affirmed Moton's disciplinary conviction on appeal. However, Grams reduced Moton's punishment to 30 days of "cell confinement" because Upthegrove had been the aggressor. Upthegrove was convicted of the disciplinary charges against him and sentenced to 8 days of "adjustment segregation," 360 days of "program segregation," and 10 days without recreation privileges.[8]

IV. Moton's Complaint

Moton filed this lawsuit on November 1, 2010, alleging that the defendants are liable for violating his civil rights under 42 U.S.C. § 1983. Moton contends that prison officials should have known that Upthegrove was psychotic and violent, and that Upthegrove posed a substantial risk of safety to other inmates. Moton claims in particular that, by assigning Upthegrove to the general population, defendants Grams and Nickel failed to protect him from a known risk of harm in violation of Moton's Eighth Amendment rights. Moton alleges further that defendants Burreson, Suliene and Alsum denied him adequate medical care in violation of the Eighth Amendment by failing to provide treatment for his bite wound. In addition, Moton argues that defendants Radtke and Alsum violated his right to due process during his disciplinary proceeding by omitting information about Moton's bite wound in order to minimize his injuries and by falsely characterizing the April 13, 2010 assault by Upthegrove as a "fight" between inmates in the conduct report.

[8] Adjustment segregation, program segregation, and disciplinary separation all are considered "major" penalties with different restrictions. *See* Wis. Admin. Code DOC § 303.68 - .70

ANALYSIS

I. Summary Judgment Standard

The purpose of summary judgment is to determine whether the parties have gathered and can present enough evidence to support a jury verdict in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001). Summary judgment is appropriate if there are no genuinely disputed material facts, and if on the undisputed facts, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The applicable substantive law will dictate which facts are material. *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 907 (7th Cir. 2008). A factual dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Roger Whitmore's Auto. Serv., Inc. v. Lake County, Ill.*, 424 F.3d 659, 667 (7th Cir. 2005).

Moton, as the plaintiff, has the burden to prove his claim. Moton must show what evidence he has that would convince a trier of fact to accept his version of the events. *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008); *see also Schacht v. Wisconsin Dept. of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999) ("Roughly speaking, [summary judgment] is the 'put up or shut up' moment in a lawsuit . . . ."). Even so, in deciding the defendants' summary judgment motion, this court must view all facts and draw all inferences in the light most favorable to Moton because he is the non-moving party. *Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569, 573 (7th Cir. 2003). But Moton may not simply rest on the allegations in his complaint; rather, he must respond by presenting specific facts that would support a jury's verdict in his favor on his claims. *Hunter v. Amin*, 583 F.3d 486, 489 (7th Cir. 2009); *Van Diest Supply Co. v. Shelby County State Bank*, 425 F.3d 437, 439 (7th Cir. 2005). If Moton fails to make a sufficient showing on an essential element of his case where he has the burden of proof, then this court must grant summary judgment to the defendants. *Celotex*, 477 U.S. at 323.

II. Eighth Amendment Duty to Protect

Moton alleges that Upthegrove had a history of violent behavior, which officials knew or should have known about. Reasoning that Upthegrove posed a substantial risk to the safety of other inmates, Moton argues that Upthegrove should not have been assigned to the general population. Moton contends, therefore, that Warden Grams and Security Director Nickel failed to protect him from a known risk of harm on April 13, 2010, when Upthegrove assaulted Moton with a home-made shank.

The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement" by ensuring that inmates receive adequate food, clothing, shelter, and medical care, and that "reasonable measures" are taken to guarantee inmate safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citations omitted); *Santiago v. Walls*, 599 F.3d 749, 758 (7th Cir. 2010). "[P]risons are inherently dangerous places and are inhabited by violent people." *United States v. Tokash*, 282 F.3d 962, 970 (7th Cir. 2002); *Riccardo v. Rausch*, 375 F.3d 521, 525 (7th Cir. 2004) ("[P]risons are dangerous places. Inmates get there by violent acts, and many prisoners have a propensity to commit more."). Nevertheless, "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Farmer*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Thus, prison officials have a duty to protect inmates "from violence at the hands of other inmates." *Borello v. Allison*, 446 F.3d 742, 747 (7th Cir. 2006) (quoting *Washington v. LaPorte County Sheriff's Dep't*, 306 F.3d 515, 517 (7th Cir. 2002)).

To establish liability for a claim based on a failure to protect or prevent harm, an inmate must show that he has been incarcerated under conditions which, objectively, posed a sufficiently serious risk of harm. *Farmer*, 511 U.S. at 834 (citations omitted). In addition, a prison official must have a "sufficiently culpable state of mind." *Id.* (citations omitted). The requisite state of mind is described as one of "'deliberate indifference' to inmate health or

safety." *Id.* This subjective element poses a "high hurdle" for a plaintiff to surmount. *Peate v. McCann*, 294 F.3d 879, 882 (7th Cir. 2002). A defendant's negligence is not enough to establish a constitutional violation. *Id*. (citing *Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997)). To establish deliberate indifference, a prisoner must show that the defendants knew of a substantial risk of serious injury to him and failed to protect him from that danger. *See Farmer*, 511 U.S. at 837; *Santiago*, 599 F.3d at 758. A of serious harm is "substantial" when it is "so great" that it is "almost certain to materialize if nothing is done." *Brown v. Budz*, 398 F.3d 904, 911 (7th Cir. 2005). "[T]he conditions presenting the risk must be 'sure or very likely to cause . . . needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)).

Failure to protect an inmate constitutes an Eighth Amendment violation only if deliberate indifference by prison officials to the inmate's welfare effectively condoned the attack by allowing it to happen. *Santiago*, 599 F.3d at 756 (quoting *Lewis v. Richards*, 107 F.3d 549, 553 (7th Cir. 1997)). Although Upthegrove ended up attacking Moton, prison officials may not be found liable for violating the Eighth Amendment if their response to the risk Upthegrove presented was reasonable. *See Farmer*, 511 U.S. at 844-45 (observing that prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted); *see also Fisher v. Lovejoy*, 414 F.3d 659, 662 (7th Cir. 2005) ("The test of deliberate indifference ensures that the mere failure of the prison official to choose the best course of action does not amount to a constitutional violation.") (quoting *Peate v. McCann*, 294 F.3d 879, 882 (7th Cir. 2002)). Against this legal backdrop, let's analyze what the defendants did here:

A. Security Director Nickel

Defendant Nickel, as security director of CCI, acknowledges that she was responsible for deciding whether to assign Upthegrove to the general population or recommend him for administrative confinement following Upthegrove's release from disciplinary segregation. Nickel considered Upthegrove's record of assaultive behavior at WCI, which consisted mainly (but not completely) of spitting or throwing bodily fluids on staff; Nickel noted that none of those incidents seriously injured anyone. Nickel observed that Upthegrove's last conduct report was in February 2008, about 1½ years earlier and that he had not engaged in any assaultive behavior since his transfer to CCI. In addition, Nickel noted that Upthegrove had only a short sentence left to serve and soon would be eligible for release. Because Upthegrove appeared to be adjusting well at CCI, Nickel approved him for placement in a single cell within the general population. Nickel believed that, by designating Upthegrove as requiring a single cell, this additional restriction, along with regular precautions taken by staff at CCI, would be sufficient to safely house Upthegrove within the general population while providing Upthegrove the opportunity to participate in rehabilitative programs in preparation for his release to the community.

Moton maintains that this decision failed to protect him adequately from a predictable harm because Nickel should have known that Upthegrove posed a substantial risk of assaulting other inmates. Nickel maintains, however, that she did not personally observe any disturbing behavior by Upthegrove and had not received any reports of problem s between Upthegrove and Moton. Nickel states that "allegations of threats are taken very seriously at CCI." If there is "clear, specific information," and an investigation determines that "a safety concern is present," then "appropriate action is taken." Nickel insists that, if any type of problem were to have been reported through the chain of command about either Upthegrove or Moton, then she "would have undertaken appropriate action to safeguard both inmates." Moton concedes that he did

not file any type of complaint indicating that there was a problem, and there is no record of enmity between Moton and Upthegrove before Upthegrove's April 13, 2010 assault.

The evidence establishes that before Nickel made her decision to place Upthegrove in a single cell within the general population rather than administrative confinement, she considered and weighed his history of misconduct, his recent conduct, his need for access to rehabilitative programs, and the ability of security staff to manage Upthegrove's behavior in the general population at CCI. In response, Moton argues that Upthegrove posed a clear risk of harm because, approximately one week before the assault occurred, Upthegrove became angry and disruptive. Specifically, Moton alleges that he witnessed Upthegrove become aggressive after an officer searched Upthegrove's cell. The officer called for psychological services and Upthegrove was escorted to DS-1 for observation. Upthegrove's identification card confirms that he was placed in observation for one day on April 7, 2010, then was returned to his cell on Housing Unit 4 on April 8, 2010. Moton adds that, based on his own conversations with Upthegrove before the attack, Upthegrove had a lengthy history of self-harm and had attempted suicide on "more than two occasions." Moton insists that Nickel knew or should have known of Upthegrove's unstable mental health, so that her failure to segregate him unreasonably created a risk that he would attack someone..

Even accepting Moton's factual predicates as true, there still is no evidence showing that Upthegrove threatened to harm Moton– or any other inmate at CCI– before the April 13, 2010 assault. Likewise, there is no evidence that Moton alerted anyone that he felt threatened by Upthegrove. As noted above, Moton told investigators that things were "okay" between them before the attack and he could not explain why Upthegrove would want to shank him. Moton

made no mention of any alarming words or behavior by Upthegrove preceding the incident that might have raised red flags.[9]

In short, Moton has not established that Nickel was aware–or should have been aware–of facts showing that Upthegrove posed a serious danger to Moton, then disregarded this danger. Put another way, Moton has not established that Nickel acted with deliberate indifference to a substantial risk of harm. *See Santiago*, 599 F.3d at 756 (observing that, to sustain an Eighth Amendment claim, a prisoner had to allege facts sufficient to show "that the defendants had actual knowledge of an impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it") (citation omitted). Because Moton has not raised a genuine issue of material fact on this prerequisite to liability under the Eighth Amendment, defendant Nickel is entitled to summary judgment.

B. Warden Grams

Defendant Grams argues that he cannot be held liable on Moton's failure-to-protect claim because he had no personal involvement in the decision to assign Upthegrove to the general population. Grams is correct.

There is no respondeat superior or vicarious liability under § 1983. *See Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978); *Kinslow v. Pullara*, 538 F.3d 687, 693 (7th Cir. 2008). A civil rights plaintiff must demonstrate that supervisory officials are personally responsible for alleged deprivations. *See Antonelli v. Sheahan*, 81 F.3d 1422, 1428 (7th Cir. 1996). To be held liable under 42 U.S.C. § 1983, supervisors "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." *T.E. v.*

[9] Records reflect that, during a subsequent interview with a psychiatrist on May 6, 2010, Moton continued to question Upthegrove's motivation for the assault: in his treatment notes, the psychiatrist observed that Moton "is a bigger guy," and that Moton could not "figure out any reason why [Upthegrove] would attack . . . ." Dkt. 37, Exh. 1, at HSU 34.

Grindle, 599 F.3d 583, 588 (7th Cir. 2010) (quoting *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988)). "In short, some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery." *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1040 (7th Cir. 2003) (quoting *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995)).

Moton does not allege facts showing that Grams had any personal connection with Upthegrove's classification or that, as a supervisory official, Grams had any link to the altercation that occurred on April 13, 2010. There is no other evidence in the record that he did. Even if Moton had articulated some basis for personal involvement on Grams's part, Moton has not demonstrated that Upthegrove was housed in the general population with deliberate indifference to the safety of other inmates, or that officials deliberately or recklessly failed to protect him. Absent evidence tying Grams to any purported unconstitutional conduct, Moton's allegations do not raise a genuine issue of material fact with respect to Grams. *See Grieveson v. Anderson*, 538 F.3d 763, 778 (7th Cir. 2008) (citing *Alejo v. Heller*, 328 F.3d 930, 936 (7th Cir. 2003) (dismissal proper where plaintiff failed to allege defendant's personal involvement in the alleged wrongdoings)). It follows that defendant Grams is entitled to summary judgment.

III. Eighth Amendment Medical Care Requirements

Moton alleges that, following his altercation with Upthegrove on April 13, 2010, defendants Burreson, Suliene and Alsum denied him adequate medical care by failing to treat his bite wound. Prison officials have a duty under the Eighth Amendment "'to provide medical care for those whom it is punishing by incarceration.'" *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Prison officials violate the Eighth Amendment if they are "deliberately indifferent" to a prisoner's "serious medical needs." *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011) (citing *Estelle*, 429 U.S. at 104). To

demonstrate deliberate indifference in this context, a prisoner must show that he had "a known, objectively serious medical condition" that posed an excessive risk to his health, but that the defendant disregarded this risk. *Farmer*, 511 U.S. at 837. A medical condition is serious if it "has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005).

A. Nurse Burreson and Dr. Suliene

Moton does not dispute that defendant Burreson treated two superficial stab wounds to his back on April 13, 2010. Moton claims, however, that he was denied treatment for his bite wound, which reportedly became infected, and that he should have been given a tetanus shot. Moton argues, therefore, that defendants Burreson and Suliene were deliberately indifferent to his medical needs by failing or refusing to provide the care that he requested.

Moton does not present any evidence that his bite wound was objectively serious or that it required treatment. The record confirms that Moton submitted more than one health service request in the days following the assault, but he made no mention of an infected bite wound. Moton concedes that he did not request treatment for a bite wound until May 6, 2010, over three weeks after the attack. When Moton was examined by Dr. Suliene on May 13, 2010, his back wounds had healed and his bite wound was no more than a bruise. Dr. Suliene observed during this examination that there was no broken skin and no infection at the site of the bite wound. Moton does not allege otherwise.

Moton does not dispute that he had received a tetanus shot in 2007 and that this vaccination was current in April 2010.[10] To the extent that Moton is dissatisfied with the defendants' response or disagrees with their decision that he did not need another tetanus shot, his allegations do not demonstrate that medical staff acted with deliberate indifference to his needs. *See Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010); *Ciarpaglini v. Saini*, 352 F.3d 328, 331 (7th Cir. 2003). In this respect, the Supreme Court has recognized that a medical decision about whether any type of diagnostic technique or form of treatment is indicated "is a classic example of a matter for medical judgment." *Estelle*, 429 U.S. at 107. A decision not to order a particular course of treatment may constitute medical malpractice, at most, but it "does not represent cruel and unusual punishment." *Id.*

The record confirms that Moton received medical care and physical therapy for the wounds that he sustained after he was attacked on April 13, 2010. Moton's allegations of inadequate care do not demonstrate that defendants Burreson and Suliene knew of a risk to Moton's health but failed to take reasonable measures to address the problem. *Farmer*, 511 U.S. at 837; *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). Because Moton has not raised a fact issue on whether he was denied care with deliberate indifference to a serious medical need, defendants Burreson and Suliene are entitled to summary judgment.

B. Alsum

Moton claims that, as health services manager, defendant Alsum violated his constitutional rights because she did nothing to intervene on his behalf to correct the failure to

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[10] According to one source, a tetanus shot is necessary only if a person "has not had a tetanus toxoid booster within the previous 10 years [of sustaining injury]." American Medical Association, *Complete Medical Encyclopedia* 1202 (2003). A tetanus booster may also be indicated if the wound is "at high risk for tetanus and the last booster was administered more than 5 years before infection." *Id.* Because Moton received a tetanus booster in 2007, the injuries that he sustained in 2010 would not warrant another vaccination.

treat his bite wound or give him a tetanus shot. According to her affidavit, Alsum is a registered nurse but her job duties did not entail direct care to patients. Rather, her job involved management and supervision of health care services provided at CCI. The record shows that Alsum forwarded all of Moton's requests for treatment to the appropriate health care providers who, in this instance, were defendants Burreson and Suliene. Alsum maintains that Moton was not denied care and that she was not deliberately indifferent to any of his requests for treatment.

Moton has not allege facts showing that Alsum failed to do her job. More to the point and as discussed above, there is no evidence that anyone at CCI was deliberately indifferent to a serious medical need that might have required Alsum to intervene in Moton's treatment. *See Fillmore v. Page*, 358 F.3d 496, 506 (7th Cir. 2004) ("there was no constitutionally impermissible failure to intervene because there was no violation that compelled intervention"). As a result, Moton does not raise a fact issue or demonstrate that Alsum is liable in her capacity as a supervisory official. *See, e.g., Burks v. Raemisch*, 555 F.3d 592, 595-96 (7th Cir. 2009) (complaint examiner's failure to tell medical staff how to do its job cannot be called deliberate indifference; "it is just a form of failing to supply a gratuitous rescue service"). It follows that Alsum is entitled to summary judgment on Moton's claim regarding his medical care.

V. Due Process in Prison Disciplinary Proceedings

Moton contends that defendants Radtke and Alsum violated his right to due process during the disciplinary proceeding that was lodged against him following the April 13, 2010 assault by Upthegrove. Moton alleges that these defendants intentionally omitted information from the conduct report regarding his bite wound in order to minimize his injuries, and falsely characterized the April 13, 2010 altercation with Upthegrove as a "fight" between inmates. Arguing that it was clear that he was defending himself from Upthegrove, Moton claims that he never should have been subject to discipline as a result of this incident.

Both Radtke and Alsum deny omitting information from the conduct report or medical records, respectively, and they deny falsifying charges against Moton. Alsum, in particular, argues that she had no personal involvement in the disciplinary proceeding or the decision to charge Moton with violating prison rules. Further, the defendants argue that in any event, Moton cannot establish a due process violation in connection with his punishment, which was reduced to a 30-day cell restriction following his administrative appeal to Warden Grams. As outlined below, the fact that Moton availed himself of the administrative appeals process establishes that he was afforded more than the minimum amount of procedural protection required by the constitution.

In the disciplinary hearing context, a prisoner's rights, if any, are governed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Prisoners charged with violating institutional rules are entitled to rights under the Due Process Clause only when the disciplinary action may result in a sanction that will infringe upon a constitutionally protected interest. *See Sandin v. Conner*, 515 U.S. 472 (1995). A prisoner challenging the process that he was afforded in a disciplinary proceeding must establish two points: (1) he has a liberty or property interest that the state has interfered with; and (2) the procedures he was afforded upon deprivation were constitutionally deficient. *Scruggs v. Jordan* ,485 F.3d 934, 939 (7th 2007).

Moton does not allege that his disciplinary proceeding implicated a property interest. As a result, relief depends on the existence of a liberty interest. The Supreme Court has recognized that sanctions which "inevitably affect the duration of [a prisoner's] sentence" implicate a liberty interest that is protected by the Due Process Clause. *Sandin*, 515 U.S. at 487. Thus, as the Seventh Circuit has recognized, prisoners have a liberty interest in their good-time credits and credit-earning classification. *See Montgomery v. Anderson*, 262 F.3d 641, 644-45 (7th Cir. 2001). It is undisputed that Moton, who is serving a life sentence, did not lose any good-time credits

as a result of his disciplinary conviction and he does not assert that his credit-earning classification was affected in any way.

In Moton's case, the adjustment committee initially imposed a sentence of 120 days in disciplinary separation, which was reduced on appeal to cell restriction for 30 days. To survive summary judgment on such a claim, a prisoner ordinarily must show that the sanctions imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 511 U.S. at 484. In that respect, a liberty interest may arise if the length of segregated confinement is substantial and the conditions of confinement are unusually harsh. *See Wilkinson v. Austin*, 545 U.S. 209, 223-24 (2005); *Marion v. Columbia Correctional Institution*, 559 F.3d 693 (7th Cir. 2009). A 30-day cell restriction, however, is not an atypical and significant hardship of the sort that implicates a liberty interest. *See Sandin*, 515 U.S. 483-84; *see also Lekas v. Briley*, 405 F.3d 602, 612 (7th Cir. 2005) (holding that 90 days in segregated confinement, with loss of program participation, prison employment, contact visits, telephone privileges, and access to church, among other hardships, did not trigger a protected liberty interest). Because Moton has not established an atypical and significant deprivation, he cannot demonstrate a constitutional violation in connection with the punishment that he received. *See Lekas*, 405 F.3d at 612.

Even if the court were to assume, arguendo, the existence of a liberty interest, Moton has not demonstrated a valid claim in this instance. The minimum amount of procedural due process required in the disciplinary context includes: (1) advance written notice of the disciplinary charges; (2) an opportunity to call witnesses and present documentary evidence (when the presentation is not unduly hazardous to institutional safety and correctional goals) before an impartial decision maker; and (3) a written statement by the fact finder of the evidence relied upon and the reason for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974). In addition, disciplinary sanctions imposed by prison officials must be supported by

"some evidence" to be consistent with due process. *Superintendent, Mass. Correctional Institution v. Hill*, 472 U.S. 445, 454 (1985); *Webb v. Anderson*, 224 F.3d 649, 652 (7th Cir. 2000) ("Even 'meager' proof will suffice, so long as 'the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary.'").

Moton does not dispute that he was afforded all of the required elements of procedural due process. In that respect, Moton conceded that he punched Upthegrove after staff ordered him to stop, meaning that there is at least "some" evidence to support the charge lodged against him. Likewise, Moton received ample notice, an opportunity to be heard at a disciplinary proceeding, and a written report of the hearing officer's findings. Moton challenged those findings on appeal and succeeded in obtaining a reduced sentence. A prisoner cannot prevail on claims of false charges where his disciplinary proceeding complied with the procedural protections outlined above in *Wolff v. McDonnell*. *See Hanrahan v. Lane*, 747 F.3d 1137, 1140 (7th Cir. 1984). Although Radtke's charging decision may seem unfair to Moton, Moton does not allege that Radtke issued the conduct report for impermissible reasons, such as retaliation. Under these circumstances, prison inmates have no due process right to avoid legitimate disciplinary charges. *See Lagerstrom v. Kingston*, 463 F.3d 621, 625 (7th Cir. 2006). Because Moton's allegations do not raise a genuine issue of material fact, the defendants are entitled to summary judgment on this issue on this claim as well.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Gregory Grams, Janel Nickel, Captain Dylon Radtke, Lori Alsum, Dalia Suliene, and Darci Burreson, dkt. 29, is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 25th day of June, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge