UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NATHAN GILLIS,

Plaintiff,

Case No. 02-C-463

JON E. LITSCHER, GERALD A. BERGE,
BRADLEY HOMPE, PAM BARTELS,[1]
KELLY COON, GARY MAIER,
TWILLA HAGAN, NANCY WILMONT,
JOHN SHARPE, and SUE WATTERS,

Defendants.

ORDER

Plaintiff Nathan Gillis, a state prisoner incarcerated at the Wisconsin Secure Program Facility (WSPF), formerly known as the Supermax Correctional Institution, filed a *pro se* civil rights complaint under 42 U.S.C. § 1983. The plaintiff was granted leave to proceed *in forma pauperis* on claims that the defendants violated his constitutional rights. Defendants Litscher, Berge, Hompe, Coon, Hagan, Wilmont, and Sharpe have filed a motion for summary judgment. Defendants Bartels, Maier, and Watters also filed a motion for summary judgment. In addition, the plaintiff has filed a summary judgment motion and a motion for default judgment. All of these motions will be addressed herein.

[1] Based on the defendants' summary judgment materials, Pam "Bartels" and "Twilla" Hagan are the correct spellings of the defendants' names. They were previously referred to as Pam Bartells and Tayler Hagan.

BACKGROUND OF THE CASE

On August 5, 2002, United States District Judge J.P. Stadtmueller screened the original complaint under 28 U.S.C. § 1915A and granted the plaintiff's petition to proceed *in forma pauperis*. This case was reassigned to me on October 9, 2002.

The plaintiff filed an amended complaint (complaint) on October 22, 2002, which is the operative complaint in this action. The complaint alleges as follows:

> In the amended complaint, plaintiff identifies three claims: 1) intentional and malicious infliction of cruel and unusual punishment, 2) deliberate indifference to serious medical needs, and 3) denial of access to the inmate grievance process and retaliation for seeking redress of grievances. Plaintiff was incarcerated at the WSPF at all times relevant to this case.
>
> In regard to claims one and two, plaintiff alleges that beginning on March 1, 2002, he was subjected to the Behavioral Management Program (BMP). Plaintiff alleges that defendants Hompe and Berge created and implemented the BMP. He did not receive due process procedures before being sanctioned with the BMP. Plaintiff was apparently sanctioned with the BMP for not sleeping in his bed in the mandatory position - a position plaintiff says was difficult or impossible because of his 6'5" height.
>
> The BMP consisted of placing plaintiff, without any clothing, in a cell that was stripped of a mattress, clothing, linen, toilet paper, and hygiene products. Plaintiff remained there for thirteen days. Plaintiff received twelve squares of toilet paper twice a day. He did not receive a shower for thirteen days. Plaintiff was also not allowed to send or receive mail and he was denied a pen or paper for which to complete an inmate complaint. He was fed only Nutraloaf for the duration of the BMP. According to plaintiff, the conditions during the BMP were more severe than control segregation, which plaintiff says is the highest level of segregation permitted by the state administrative code.
>
> For thirteen days, plaintiff slept on bare concrete and thereby received painful sores and rashes that occasionally bled on various parts of his body. Plaintiff paced the cement floor in an effort to stay warm and the constant barefooted pacing resulted in injury to the plaintiff's feet causing painful cracking, peeling, and bleeding of the skin. Plaintiff suffers from chronic high blood pressure that requires blood pressure stabilization medication and monitoring. During the thirteen day BMP, plaintiff's blood pressure reached levels that caused him dizziness and confusion.

Plaintiff alleges that he began to suffer mental decomposition including anxiety attacks, severe depression, helplessness, a sense of despair, suicidal thoughts, and hearing voices. Defendant Nancy Wilmont was contacted to converse with plaintiff pursuant to his mental state of mind. Defendant Wilmont discovered that plaintiff had bitten a hole in his wrist, smeared both blood and feces on the cell walls, and was in a general unstable mental state as a result of the BMP. Defendant Wilmont intervened with the BMP and placed plaintiff on medical observation, where he remained for approximately eight days. However, the medical observation also took place in a stripped cell and the plaintiff did not have any clothes. Following the plaintiff's assignment to medical observation he was returned to the BMP.

While he was in the BMP cell, the plaintiff was able to converse with other inmates through vent ducts. Those inmates filed medical request slips with defendants Nurse Sue and Pam Bartells [sic] about plaintiff's high blood pressure, skin sores, rashes, and foot injury. Defendant Bartells [sic] ignored the plaintiff's medical condition. Defendant Nurse Sue visited plaintiff but refused to check his blood pressure or treat his injuries. Defendants Litscher, Berge, Hompe, and Coon also ignored medical requests sent to them by the other inmates about plaintiff's blood pressure and injuries.

Plaintiff had the inmates send requests and letters to Dr. Hagan and Dr. Maier pertaining to plaintiff's mental decomposition. Dr. Hagan ignored the requests. Dr. Maier did visit with plaintiff while he was on the BMP but he only stated that plaintiff is now at Supermax (now the WSPF) and that he should follow its rules.

. . .

In what plaintiff has labeled claim three he asserts both a denial of access to the inmate grievance process and retaliation for using that process. Plaintiff alleges that defendant Coon failed to process many of his inmate grievances when he got out of the BMP. The plaintiff does acknowledge that an ample amount were filed and proceeded through the grievance system to satisfy the herein contentions. But he alleges that defendant Coon intentionally interfered with the exhaustion process by not letting him file inmate complaints. Plaintiff does not say what he was prevented from complaining about. Plaintiff also complains that the inmate grievance system fails to comport with requirements of federal law and regulations.

Plaintiff must advance through a five-step level system at the WSPF in order to be returned to the general prison population. Plaintiff alleges that defendant Sharpe retaliated against him for filing administrative grievances by keeping plaintiff on Level 2 at WSPF.

> Plaintiff also asserts that he complained to defendants Wilmont and Hagan and filed a grievance about the severe side effects he was suffering from medication prescribed by Maier. In retaliation for the complaints, plaintiff says, Wilmont placed plaintiff in a stripped cell for five days for medical observation and Dr. Maier terminated any medication. They and Hagan now refuse to treat plaintiff's medical condition at all. Plaintiff's allegations concerning Sharpe, Wilmont, Maier, and Hagan state a retaliation claim.

(Screening Order Jan. 17, 2003, at 4-6, 8.)

The court screened the complaint pursuant to 28 U.S.C. § 1915A and allowed the plaintiff to proceed on the following claims: 1) an Eighth Amendment cruel and unusual punishment claim for the conditions of the Behavioral Management Program (BMP), and that the plaintiff was placed on the BMP without due procees of law; 2) an Eighth Amendment claim of deliberate indifference to a serious medical need; 3) a denial of access to the courts claim for interference with the inmate grievance process; and 4) a retaliation claim for using the inmate grievance process.

On March 9, 2004, the court denied the plaintiff's motion for partial summary judgment as to his Eighth and Fourteenth Amendment claims because factual questions remained and the plaintiff failed to establish he was entitled to judgment as a matter of law. The March 9, 2004, Order also denied the plaintiff's motion for default judgment and motion to compel discovery.

The plaintiff filed an interlocutory appeal along with a request to proceed *in forma pauperis* on appeal, seeking to appeal the court's denial of his motion for partial summary judgment, default judgment, and motion to compel discovery. On April 24, 2004, the court denied the plaintiff's request to proceed *in forma pauperis* on appeal and certified that the appeal had been taken in bad faith. The plaintiff failed to timely pay the appellate filing fee and the Seventh Circuit Court of Appeals dismissed his case on May 21, 2004.

On June 7, 2004, defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont filed a motion for summary judgment. Represented by separate counsel, defendants Bartels, Watters, and Maier also filed a motion for summary judgment on June 7, 2004. The plaintiff filed responses to both motions, on June 9, 2004 and June 15, 2004, respectively, and he also filed his own motion for summary judgment as part of his response to defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont's summary judgment motion. Defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont filed a letter reply on July 13, 2004, and the plaintiff filed a sur-reply on July 15, 2004.

On July 14, 2004, the plaintiff filed a "Motion for Rule 55, Default against all the defendants represented by Attorney Jennifer Sloan Lattis, for refusing to respond to plaintiff summary judgment motion dated 6-7-04." This motion will be denied. Defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont did not file a separate response to the plaintiff's motion for summary judgment. They did, however, address the plaintiff's "Motion for Summary Judgment/Response to Defendants' Motion for Summary Judgment" in a July 13, 2004, reply letter.

Federal Rule of Civil Procedure 55 provides in relevant part:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or other wise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the default.

Fed. R. Civ. P. 55(a). The plaintiff has not shown that default judgment against these defendants is warranted in this case and therefore his motion will be denied.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is required "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For a dispute to be genuine, the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." *Id.* For a fact to be material, it must relate to a disputed matter that "might affect the outcome of the suit." *Id.*

Although summary judgment is a useful tool for isolating and terminating factually unsupported claims, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986), courts should act with caution in granting summary judgment, *Anderson*, 477 U.S. at 255. When the evidence presented shows a dispute over a fact that might affect the outcome of the suit under governing law, summary judgment must be denied. *Id.* at 248.

The moving party bears the initial burden of demonstrating that he is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323. Where the moving party seeks summary judgment on the ground that there is an absence of evidence to support the nonmoving party's case, the moving party may satisfy his initial burden simply by pointing out the absence of evidence. *Id.* at 325. Once the moving party's initial burden is met, the nonmoving party must "go beyond the pleadings" and designate specific facts to support each element of the cause of action, showing a genuine issue for trial. *Id.* at 322-23. Neither party may rest on mere allegations or denials in the pleadings, *Anderson*, 477 U.S. at 248, or upon conclusory statement in affidavits, *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989). In considering a motion for summary judgment, I may consider any materials that would be admissible or usable at trial, including properly authenticated and admissible documents. *Woods v. City of Chicago*, 234 F.3d 979, 988 (7th Cir. 2000).

In evaluating a motion for summary judgment, the court must draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, it is "not required to draw every conceivable inference from the record - only those inferences that are reasonable." *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991).

RELEVANT UNDISPUTED FACTS

A. The Plaintiff's Affidavits

The plaintiff submitted two affidavits, one in response to defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont's motion for summary judgment and the other in response to defendants Bartels, Watters, and Maier's motion. The affidavits purport to dispute the defendants' proposed findings of fact. However, they do not cite to anything in the record.

For example, in response to defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont's motion, the plaintiff avers:

> Defendants' Proposed finding of fact aren't true at paragraph numbers #17, #18, #19, #20, #21, #23, #24, #25, #26, #27, #28, #29, #30, #35, #37, #42, #44, #46, #49, #53, #61, #62, #63, #64, #65, #66, #67, #68, #69, #70, #71, #72, #74, #75, #76, #77, #78.

(Aff. of Nathan Gillis, Docket #199, at 2.) Likewise, in response to defendants Bartels, Watters, and Maier's summary judgment motion, the plaintiff avers:

> The following parts of defendants Watters, Maier's [sic], Bartels proposed finding of facts and conclusions of law are not true numbers #7, #8, #9, #10, #11, #12, #13, #14, #15, #17, #18, #20, #21.

(Nathan Gillis's Aff. in Opp'n to Defs.' PFOF and Conclusions of Law, Docket #203, at 2.)

The Federal Rules of Civil Procedure provide:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e). "It is well-settled that conclusory allegations . . . without support in the record, do not create a triable issue of fact." *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 354 (7th Cir. 2002) (citing *Patterson v. Chi. Ass'n for Retarded Citizens*, 150 F.3d 719, 724 (7th Cir. 1998)).

The defendants' properly supported proposed findings of fact are not effectively disputed by the plaintiff simply swearing that they are "not true." The court will not consider the plaintiff's "disputes" to the defendants' proposed findings of fact to the extent they do not comport with the Federal Rules and relevant case law.

B. Defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont's Motion

Defendant Hompe has been employed by the Wisconsin Department of Corrections (DOC) since March 1995. (Hompe Aff. ¶ 3.) He began his employment at WSPF in January 2000, at which time he was a captain until he was promoted to Corrections Unit Supervisor ("unit manager") of Alpha Unit in September 2000. *Id.*

As the unit manager of the Alpha Unit at WSPF, under the general supervision of the deputy warden, Hompe was responsible for the security, treatment, and general living conditions of all inmates assigned to the unit. (Hompe Aff. ¶ 4.) The unit manager is an administrator responsible for all activities within the unit; the development, implementation, and monitoring of overall

institution goals, policies, and procedures as part of the institution management team and the direction of an institution-wide program. (*Id.*)

Defendant John Sharpe has been employed as a Supervising Officer 2 ("captain") at WSPF since July 21, 2002. (Affidavit of John Sharpe [Sharpe Aff.] ¶ 2.) Prior to that, he was employed at WSPF as a unit manager from December 3, 2000 until July 20, 2002. (Sharpe Aff. ¶¶ 3, 5.)

Defendant Kelly Trumm, formerly known as Kelly Coon, is employed at WSPF as an institution complaint examiner. (Aff. of Kelly Trumm [Trumm Aff.] ¶ 2.) She was previously employed as a Program Assistant II - Confidential at WSPF. (Trumm Aff. ¶ 3.) In that capacity, Trumm coordinated and provided program assistance to the institution complaint examiner. (*Id.)* Trumm has been employed at WSPF since March 26, 2000, and she has held the position of institution complaint examiner since September 22, 2002. (Trumm Aff. ¶ 4.)

Vincent Escandell is employed by the DOC as a Psychologist Supervisor - Doctorate at WSPF and he has held this position since Febraury 10, 2003. (Aff. of Vincent Escandell [Escandell Aff.] ¶ 2.) In his capacity as psychologist, Escandell is responsible for the overall administration of clinical services and the development, administration, and coordination of all clinical programs within the institution. (Escandell Aff. ¶ 3.)

Ellen Ray has been employed at WSPF as an institution complaint examiner since February 18, 2001. (Aff. of Ellen Ray [Ray Aff.] ¶ 2.) In her capacity as institution complaint examiner, Ray is the custodian of inmate complaints filed by inmates while incarcerated at WSPF. (Ray Aff. ¶ 3.) She also has access to records which are generated and/or maintained at the institution, and which pertain to the inmates who are incarcerated at WSPF. (*Id.)*

Defendant Hompe developed the Behavior Management Plan (BMP) and it was approved by the WSPF Warden, defendant Gerald A. Berge. (Hompe Aff. ¶ 5.)

On February 22 and 23, and March 1, 2002, defendant Hompe and C.O. Nick Furrer observed that the plaintiff broke WSPF policy by refusing to lay on his bed with his head towards the back of the cell. (Hompe Aff. ¶ 6, Ex. 1.) The plaintiff would also misuse his property by obstructing the officers' view of him by covering his face with his blanket. (*Id.)* These rules are in effect for inmates' safety. (*Id.*) Normal counseling and discipline did not correct the plaintiff's behavior. (Hompe Aff. ¶ 7.)

On March 1, 2002, at 9:00 a.m., the plaintiff was placed on the BMP. (Hompe Aff. ¶ 8.) At that time, the plaintiff received a copy of the plan outline informing him that he was being placed on a behavior management plan due to his continuous refusal to follow WSPF policy, directives, and his misuse of property.[2] (*Id.)* Defendant Hompe also stated to the plaintiff, face-to-face, that

---

[2] Defendant Hompe sent the plaintiff a memo which states in relevant part:

> Due to your continuous refusal to follow SMCI policy, directives and misuse of property you are being placed on a behavior management plan. Specifically, you refuse to lay on your bed with your head towards the back of your cell and you use your property to obstruct the officers' view of you. This plan will be reactivated each time you display the mentioned inappropriate behavior.
>
> > **Stage One**: You will be placed on stage one for a period of three days. All property will be removed from your cell during this time and you will receive nutri-loaf for meals.
> >
> > **Stage Two**: Upon completion of three days in stage one with appropriate behavior the Unit Manager may initiate stage two. Stage two will be in effect for 7 days. In stage two your in cell property will be limited to a segregation smock. You will receive regular meals. In stage two you will receive hygiene items two times per day and will receive showers on regular shower days. Upon completion of day 7 in stage two with appropriate behavior, the Unit Manager may deactivate the plan.

(Hompe Aff. ¶ 8, Ex. 2.)

he would be placed on the BMP and informed him of the policies and procedures of it. (Hompe Aff. ¶ 9.)

Stage one of the BMP lasts for three days. (Hompe Aff. ¶ 10.) During this time an inmate will receive nutri-loaf for meals served on styrofoam trays. (*Id.*) Mail is restricted to legal mail. (*Id.*) Staff will show the inmate the mail and place it in storage until the inmate is eligible to receive the items. (*Id.*) Upon completion of the three days in stage one with appropriate behavior the unit manager may initiate stage two. (Hompe Aff. ¶ 11.)

Stage two of the BMP lasts for seven days. (Hompe Aff. ¶ 12.) Inmates will receive a segregation smock and will receive meals on regular trays. (*Id.*) Inmates will receive hygiene items two times per day, will receive showers on regular shower days, and will resume regular laundry schedule. (*Id.*) Inmates will be shown mail but cannot possess the mail in their cells. (*Id.*) Inmates will have the use of nail clippers, razors and cleaning supplies with appropriate behavior. (*Id.*) Upon completion of the seven days in stage two with appropriate behavior the unit manager may deactivate the plan. (Hompe Aff. ¶ 13.)

Any inappropriate behavior will result in being placed on day one of stage one. (Hompe Aff. ¶ 14.) Security restrictions may also alter this plan and will continue after deactivation of the plan. (Hompe Aff. ¶ 15.) The plan will be in effect for a period of six months and will be activated when the inmate displays inappropriate behavior. (Hompe Aff. ¶ 16.) At the end of the six month period, with appropriate behavior from the inmate, the BMP will be discontinued. (*Id.*) The unit manager may modify this plan at any time. (Hompe Aff. ¶ 17.) Since writing materials are not allowed in the cell with an inmate on clinical observation or BMP, the complaint deadline for inmates is extended. (Hompe Aff. ¶ 18.) An inmate may also make complaints to the inmate complaint examiner verbally. (*Id.*)

On March 1, 2002, at approximately 9:00 p.m., the plaintiff was placed on clinical observation to run concurrent with the BMP after he made statements regarding his intent to harm himself, smeared feces on security cameras, bit and scratched himself, and smeared blood on the walls. (Hompe Aff. ¶ 19; Escandell Aff. ¶ 4.) Once the plaintiff was placed on clinical observation the rules and procedures of clinical observation took precedence over those of the BMP. (Hompe Aff. ¶ 20.) When an inmate is placed on clinical observation, property is limited by clinical staff for the inmate's safety and the inmate is observed every fifteen minutes. (Escandell Aff. ¶ 5.) Due to the plaintiff's threats of self-harm, he was allowed only items that were not deemed hazardous to his safety. (Hompe Aff. ¶ 21; Escandell Aff. ¶ 6.)

A Review of Offender in Observation was completed by Dr. Apple on March 2, 2002. (Escandell Aff. ¶ 7.) The Review of Offender in Observation form states in part:

> Staff report to this writer that Mr. Gillis was picking at wounds & writing in wall in blood [ ] words 'HELP ME.' He would not verbalize to staff his ideation or intent to self harm. He continued to produce blood w/o verbalizing intent to harm or remain safe. Further/heightened monitoring was necessary to ensure safety.
>
> . . .
>
> Mr. Gillis reported that he intends to harm himself but wouldn't elaborate why. He had feces smeared all over the windows but with visible areas to assess the i/m. He wishes to speak [ ] Dr. Maier to assess poss. of Rx mgmt. He is currently on BMP. All previous restrictions apply. Organized, clear & coherent oriented x 3.

(Escandell Aff. ¶ 4, Ex. 1; Gillis Aff. Ex. at [unpaginated] 2.)

Dr. Apple decided to continue Gillis' confinement in observation due to his verbalization to harm himself. (*Id.*) Dr. Apple found the plaintiff lucid but the plaintiff would not elaborate on intent or plan to harm himself. (*Id.*) Dr. Apple also found that the plaintiff needed to be monitored for safety from self-harm. (*Id.*)

Defendant Natalie Wilmont, a crisis intervention worker, completed a Review of Offender in Observation on March 4, 2002. (Escandell Aff. ¶ 8.) The plaintiff reported suicidal ideations and presented a clear danger to himself. (*Id.*) The plaintiff stated that he wanted "a razor to cut his jugular." (*Id.*) He was noticeably agitated. (*Id.*) Wilmont stated that clinical observation was needed to insure the plaintiff's level of safety in a safe controlled environment. (*Id.*)

On March 6, 2002, Wilmont completed a Review of Offender in Observation. (Escandell Aff. ¶ 9.) Wilmont noted that the plaintiff seemed to be improving. (*Id.*) He was more future-oriented and acknowledged the fact that he reported suicidal ideations. (*Id.*) Wilmont again continued the plaintiff's clinical observation due to his recent statements of self-harm and to ensure that his mood was stabilizing so that he had no further intent to harm himself. (*Id.*)

On March 6, 2002, Wilmont authorized a "seg gown" for the plaintiff and a "styrofoam tray-no spoon" for meals. (Hompe Aff. ¶ 23; Escandell Aff. ¶ 10.) On March 7, 2002, Wilmont added toothbrush and toothpaste at 7 a.m. and 9 p.m. hygiene times. (Hompe Aff. ¶ 22; Escandell Aff. ¶ 11.) Hygiene products were not allowed in the cell for the plaintiff's safety. (*Id.*)

After a review on March 11, 2002, the plaintiff appeared future-oriented and calm. (Hompe Aff. ¶ 24; Escandell Aff. ¶ 12.) He indicated no suicidal ideation and he was then released from observation. (*Id.*) The plaintiff's BMP was placed on inactive status on March 11, 2002. (Hompe Aff. ¶ 25.) On July 17, 2002, the plaintiff's BMP was discontinued. (Hompe Aff. ¶ 26.)

On March 26, 2002, the plaintiff made statements of self-harm. (Escandell Aff. ¶13.) He was again placed on clinical observation. (*Id.*) The plaintiff was given a "seg smock" and "styrofoam trays-no spoon" at meals. (Escandell Aff. ¶ 14.) Due to the plaintiff's threats of self-harm, he was again allowed only items that were not deemed hazardous to his safety. (*Id.*)

Wilmont completed a Review of Offender in Observation on March 27, 2002. (Escandell Aff. ¶ 15.) The plaintiff had draped a sheet around his neck and affirmed intent to harm himself. *(Id.)* The plaintiff was released from clinical observation on March 29, 2002. (Escandell Aff. ¶ 16.)

Pursuant to Wisconsin Administrative Code § DOC 310.09(2), inmates may not file more than two complaints per calendar week, except that the inmate complaint examiner may waive this limit for good cause. (Trumm Aff. ¶ 5.) The inmate complaint examiner shall exclude complaints that raise health and personal safety issues from this limit. (*Id.)* Since writing materials are not allowed in the cell with an inmate on clinical observation or the BMP, the complaint deadline for inmates is extended. (Trumm Aff. ¶ 6.) An inmate may also make complaints to the inmate complaint examiner verbally. *(Id.)*

On March 18, 2002, the plaintiff attempted to file an inmate complaint against defendant Hompe. (Trumm Aff. ¶ 7.) On March 20, 2002, defendant Trumm (f/k/a Coon) returned the plaintiff's complaint to him with a memo stating that pursuant to DOC 310.09(2), only two complaints may be filed in any calendar week. (Trumm Aff. ¶ 8.)

On April 4, 2002, the plaintiff filed inmate complaint SMCI-2002-12001 against defendant Trumm (f/k/a Coon) regarding complaints returned because he had exceeded his limit of complaints allowed per week. (Trumm Aff. ¶ 9.) Diane Merwin recommended dismissal of this complaint on April 8, 2002, citing DOC 310.09(2). (Trumm Aff. ¶ 10.) Ms. Merwin found that during the week in question, the ICE Office accepted four complaints from the plaintiff (SMCI-2002-9911 on March 18, 2002; SMCI-2002-9916 on March 18, 2002; SMCI-2002-9917 on March 18, 2002; and SMCI-2002-10410 on March 22, 2002). *(Id.)* Defendant Warden Berge dismissed SMCI-2002-12001 on April 8, 2002. *(Id.)* The plaintiff appealed the decision of the inmate complaint examiner on SMCI-

2002-12001 to the corrections complaint examiner, John Ray. (Trumm Aff. ¶ 11.) John Ray recommended dismissal of this complaint on April 16, 2002, based on Ms. Merwin's findings. (Trumm Aff. ¶ 12.) Cindy O'Donnell dismissed SMCI-2002-12001 on April 21, 2002. *(Id.)*

Inmates who have been administratively transferred to WSPF generally progress through several security levels before they are deemed ready to leave WSPF and be reintegrated into the general population of other DOC institutions. (Sharpe Aff. ¶ 7.) This progressive structure provides for inmates to obtain greater privileges and more property in direct relation to demonstrated improvements in attitude and behavior. *(Id.)* The structure also provides inmates with an incentive for rehabilitation by offering rewards for improved behavior and program completion, as well as demotion for misbehavior. *(Id.)* Demotion results in less privileges and less property for an inmate. *(Id.)*

WSPF inmates progress through the level system by a combination of good behavior and, at higher levels, good behavior and successful program participation. (Sharpe Aff. ¶ 8.) The level program process is designed to encourage an inmate's positive adjustment while at WSPF and to provide an opportunity for the inmate's successful return to a less restrictive institution. (Sharpe Aff. ¶ 9.) The goal is to provide a controlled increase in privileges and responsibilities in order to promote acceptable conduct. (Sharpe Aff. ¶ 10.) This is accomplished utilizing a process that provides individuals a chance to attain levels while at WSPF and placement in a less restrictive institution. *(Id.)*

An inmate's behavior can change his level status at any time. (Sharpe Aff. ¶ 11.) If an inmate engages in negative conduct, it may result in a demotion of his level status. (*Id.*) An inmate may be demoted at any time due to negative behavior and he will remain there until review by the

review team. (*Id.*) An inmate may be promoted to a higher level based on positive behavior. (Sharpe Aff. ¶ 12.) To be promoted an inmate needs to fill out an application for promotion. (*Id.*)

Unit managers would generally send out an application to the inmate a week before he was eligible for promotion. (Sharpe Aff. ¶ 13.) The recommendation to demote or promote would be made by the review team and approved by the unit manager. (Sharpe Aff. ¶ 14.) The unit manager and the review team would meet once a week to discuss the general attitude and behavior of the inmates applying for promotion and then vote on whether the inmate has met the standards for promotion. (Sharpe Aff. ¶ 15.) Inmate level demotions are based on conduct reports and warnings in the behavior log. (Sharpe Aff. ¶ 16.) There is no set number of violations for a level demotion. (*Id.*) Demotions are made on a case-by-case basis, depending on the number and seriousness of violations. (*Id.*) An inmate would not be promoted if he did not fill out an application for promotion. (Sharpe Aff. ¶ 17.)

The plaintiff was held on Level Two from April 5, 2002 until October 7, 2002, due to his continual negative and disruptive behavior. (Sharpe Aff. ¶ 18.) The plaintiff also failed to complete the application for promotion. (Sharpe Aff. ¶ 19.) He was given applications for promotion on August 23, 2002, and September 20, 2002, but never completed them. (*Id.*) On October 7, 2002, the plaintiff was demoted to Level One for disruptive and disrespectful behavior. (Sharpe Aff. ¶ 20.)

In order to exhaust administrative remedies, an inmate must comply with the requirements of Wisconsin Administrative Code § DOC 310 and Administrative Directive 11.6 (formerly 11.5). (Ray Aff. ¶ 4.) Ray has diligently searched the regularly conducted business records of her office with respect to inmate complaints filed by the plaintiff during the period surrounding the claims

made regarding his status on the BMP in March 2002. (Ray Aff. ¶ 5.) As result of her search, Ray found that the only inmate complaint that the plaintiff filed during the period that concerns the claims asserted by the plaintiff were the following: SMCI-2002-9507, 9508, 9911, 9916, 9917, 10410, 10748, 12001, 12828, 14358, and 21005. (Ray Aff. ¶ 6.) Of these eleven complaints, SMCI-2002-9508, 10410, and 14358 did not comply with the requirements of Wis. Admin. Code § DOC 310 and Administrative Directive 11.5. (Ray Aff. ¶ 7.) In the eight complaints that complied with the requirements of Wis. Admin. Code § DOC 310 and Administrative Directive 11.5, the plaintiff did not complain or raise any issues about the conduct of defendant Twilla Hagan. (Ray Aff. ¶ 8.)

C. Defendants Bartels, Watters, and Maier's Motion

Defendant Pam Bartels is a registered nurse who was the Health Services Administrator at WSPF from November 1999 to August 2002. (Aff. of Douglas S. Knott [Knott Aff.] ¶ 4.) Defendant Bartels was an employee of Prison Health Services, Inc., a private company that provided health care services at WSPF pursuant to a contract with the DOC. (Knott Aff. ¶ 3.) Defendant Suzanne Watters was employed as a registered nurse by Prison Health Services, Inc., from 2001 to 2002. (Knott Aff. ¶ 5.) Defendant Dr. Gary Maier was employed by Prison Health Services, Inc., in March of 2002 as a psychiatrist; he is currently employed by the DOC in the same capacity. (Knott Aff. ¶ 6.)

The plaintiff was transferred to WSPF on February 15, 2002. (Knott Aff. ¶ 7, Ex. A.) A medical screening conducted at the time of his transfer indicated that he had a history of hypertension. (*Id.*)

On March 1, 2002, WSPF security staff placed the plaintiff on a BMP after repeated violations of institution policy. (Hompe Aff. ¶ 9.) On March 1, 2002, the plaintiff requested to see a nurse, complaining of chest pain. (Knott Aff., Ex. B.) When the nurse responded, the plaintiff informed the staff that he did not have chest pain, but wanted eye drops. (*Id.*)

The plaintiff made another complaint of chest pain and numbness on March 15, 2002, and was promptly seen and evaluated. (Knott Aff. ¶¶ 10, 20, Exs. D, N.) He was found by the nurse to not be in need of treatment. (*Id.*)

On March 16, 2002, the plaintiff again complained of "elevated blood pressure" and chest pain, prompting another evaluation by a nurse. (Knott Aff. ¶ 10, Ex. D.) When a staff nurse went to evaluate the plaintiff's complaints, he refused to come out of his cell to be evaluated. (*Id.*)

On March 22, 2002, the plaintiff again complained of chest pain and high blood pressure. (Knott Aff. ¶ 11, Ex. E.) When a staff nurse went to assess the plaintiff, his blood pressure was elevated, at which time the nurse administered medication and notified the physician's assistant. (*Id.*) Thirty minutes later, the plaintiff's blood pressure was monitored and had returned to normal levels. (*Id.*) The plaintiff stated at that time that he felt much better. (*Id.*)

The plaintiff was evaluated and diagnosed with dry flaky skin on his arms and face on February 18, 2002. (Knott Aff. ¶ 8, Ex. B.) A therapeutic ointment was prescribed and the medication log for March of 2002 indicates that the plaintiff received this treatment daily, as prescribed, unless he refused. (Knott Aff. ¶ 14, Ex. H.) The plaintiff's medical records indicate that he complained of a rash that developed on his "inner elbows." (Knott Aff. ¶ 10, Ex. D.) Defendant Watters visited the plaintiff on March 6, 2002 to assess his complaints, and noted in the chart, "no rash or alteration in skin integrity." (*Id.*)

The plaintiff was seen and evaluated by Dr. Maier on March 5, 2002. (Knott Aff. ¶15, Ex. I; Affidavit of Gary Maier [Maier Aff.] ¶ 3.) Dr. Maier concluded that the plaintiff was having problems adjusting to the conditions, but did not warrant further treatment at that time. (Knott Aff. ¶ 15, Ex. I.) The March 5, 2002, Psychiatric Report from that evaluation states in part:

> I saw Mr. Gillis today in the obs cell on range 3 on A unit today. He was in a room, stripped, no clothes, no mattress and there was clear writing on the wall in his own blood. It said things like help me. There were initials and then there was a creative spray paint type flicking all around the room and you could see where he had taken some of his food and pressed it into one of the vents. He got up from his lying posture and came over to the door and made good eye contact with me. I identified myself to him and asked him how he was doing. He said he wasn't sure. He says from time to time he believes that he hears voices and he said other times he isn't sure. He thinks that he has a mental disorder but he doesn't know what it is. He wasn't sure exactly why he took his fingernail and created some blood and why he did the spray painting. He said that it seemed to relieve tension. I asked him how all this started and he said that they wanted him to sleep in the bed the other way, that is so they could see his head. I asked him why he didn't do that. He said he wasn't sure. I asked him if he understood there was a rule that you sleep with your head at one end of the bed and that the security reason for that is that they can see your head and they can see that you are breathing. He said he did and then he said that he heard voices. I said what if we treated the voices what would happen with the way you sleep. He said he wasn't sure. I said well then if you can't follow the basic rules here you are likely to be deprived of some of the comforts of life that this place offers.
>
> . . .
>
> I am hearing more of the history from security and it appears that he is in a power struggle and he will eventually learn that it is better for him to follow the rules here.

(Nathan Gillis's June 15, 2004, Aff., Ex. I at 1-2.)

Dr. Maier saw the plaintiff again on March 19, 2002, at which time he diagnosed depression and prescribed Celexa to treat the plaintiff's symptoms. (Knott Aff. ¶ 16, Ex. J; Maier Aff. ¶ 4.) Dr. Maier discontinued the medication Celexa when the plaintiff complained of side effects. (Knott Aff. ¶ 17, Ex. K; Maier Aff. ¶ 5.) Dr. Maier substituted Prozac for Celexa on June 11, 2002. (*Id.*)

Dr. Maier discontinued the prescription for Prozac when he learned that the plaintiff was not taking the required doses, thereby eliminating any therapeutic effects of the medication. (Knott Aff. ¶ 18, Ex. L.)

There is no evidence that the plaintiff suffered a heart attack or stroke during March of 2002. (Knott Aff. ¶¶ 7-15, Exs. A-I.) The plaintiff had been prescribed Atenelol for hypertension. (Knott Aff. ¶ 14, Ex. H.) The medical records indicate that the plaintiff received every dose of his hypertension medication during March of 2002. (*Id.*) On the single occasion that he experienced dizziness, he was promptly treated and reported feeling better within thirty minutes. (Knott Aff. ¶ 11, Ex. E.)

ANALYSIS

A. Defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont's Motion

The defendants contend that there are no real disputes of material fact in this case. They state that the plaintiff's allegations are generally true, but he has left out many details which defeat his motion.

The defendants argue that the conditions that the plaintiff experienced in March 2002 did not violate the Eighth Amendment. Specifically, they contend that: 1) the plaintiff's placement on clinical observation status was warranted by concern for his safety and did not violate the Eighth Amendment; 2) removal of the plaintiff's clothing was necessary for his safety and did not violate the Eighth Amendment; 3) the plaintiff was given meals and hygiene products; and 4) removal of the plaintiff's mattress and bedding did not violate the Eighth Amendment.

The defendants also contend that the plaintiff's Fourteenth Amendment due process rights were not violated. In that regard, the defendants assert that: 1) the plaintiff was not entitled to disciplinary process before being placed on clinical observation status; 2) the plaintiff retained his right to file inmate complaints; and 3) the plaintiff was not denied due process when he was not moved up to a higher "level" at WSPF.

The defendants argue that the plaintiff cannot maintain a retaliation claim. They also argue that the plaintiff has failed to exhaust his administrative remedies against defendant Hagan.

The plaintiff contends that summary judgment should be granted in his favor, and against the defendants. He asserts that there are "extremely large holes in the defendants' arguments concerning their treatment of plaintiff related to his claims before the court." (Pl.'s Br. at 3.) He also contends that the conditions he suffered while on the BMP did violate the Eighth Amendment and that he "was placed on the BMP for sadistic reason that plaintiff does not fully understand." (*Id.*)

The plaintiff asserts that the defendants refuse to explain exactly what the plaintiff was denied while on the BMP, namely "clothing, bedding, shoes, socks, food, medical treatment, the ability to file an inmate complaint, and forced plaintiff to sleep naked on bare concrete for 13 days." (*Id.* at 4.) The plaintiff further asserts that these same restrictions applied while he was on observation status. The plaintiff states that he was not given a warning or any other reasons that would justify the treatment he received and that he was placed on the BMP within a week of arriving at WSPF.

The plaintiff contends that his Fourteenth Amendment due process rights were violated because he was not given any due process hearing before being placed on the BMP. He also states

that the defendants interfered with his right and ability to file an inmate complaint while on the BMP and that the DOC did not authorize any complaints to be filed beyond the fourteen day time limit.

The plaintiff contends that he "was retaliated against by defendants as explained in this complaint" and that the defendants' arguments about him not being able to maintain a retaliation claim should be rejected. (*Id.* at 8.) Finally, the plaintiff argues that he did exhaust administrative remedies as to defendant Hagen, in inmate complaint SMCI-2002-20354, and that the inmate grievance was "officially dismissed" on July 26, 2002. (*Id.* at 9.)

1. Eighth Amendment Conditions of Confinement and Due Process of Law Claim

To establish a prima facie case that prison conditions violate the Eighth Amendment, the plaintiff must demonstrate: (1) a serious deprivation of a basic human need; and (2) prison officials' deliberate indifference thereto. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). The first component, namely, the "sufficiently serious" nature of the acts or practices alleged, is objective. (*Id.*) Absent any fixed formula therefor, the court must apply the evolving standard of decency in society at large. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Caldwell v. Miller*, 790 F.2d 589 (7th Cir. 1986). "[E]xtreme deprivations are required to make out a conditions-of-confinement claim." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Only those deprivations that deny the "minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation. *Id.* (quoting *Wilson*, 501 U.S. at 298).

To establish the second component of a prima facie case, the plaintiff must show that, in inflicting the allege punishment, "the officials act[ed] with a sufficiently culpable state of mind." *Wilson*, 501 U.S. at 298. Deliberate indifference means recklessness in a criminal or subjective

sense. *See Farmer v. Brennan*, 511 U.S. 825, 838 (1994). "Under the subjective standard, it is not enough to show that a state actor should have known of the danger his actions created. Rather, a plaintiff must demonstrate that the defendant had actual knowledge of impending harm which he consciously refused to prevent." *Tesch v. County of Green Lake*, 157 F.3d 465, 476 (7th Cir. 1998) (quoting *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996)).

It is undisputed that the plaintiff was placed on the BMP on March 1, 2002, at 9:00 a.m. During stage one of the BMP, which lasts for a minimum of three days, all property is removed from an inmate's cell. The following is considered "property": socks, underwear, T-shirt, pullover shirt, shorts, pants, "seg. shoes," shower shoes, wash cloth, towel, bed sheets, blankets, pillowcase, mattress, and pillow. (Sharpe Aff. ¶ 7, Ex. 1 at 13.) Thus, to put in bluntly, on March 1, 2002, at 9:00 a.m., the plaintiff was placed completely naked in a completely bare cell.

It is also undisputed that on March 1, 2002, at 9:00 p.m., the plaintiff was placed on "Clinical Observation to run concurrent with the BMP." (Hompe Aff. ¶ 19.) The decision to change the plaintiff's status was made after he was found to be picking at his wounds and writing "help me" on the wall with his blood, smearing feces on security cameras and windows, and making statements that he intended to harm himself. The rules and procedures of clinical observation take precedence over those of the BMP. However, in this case, the facts indicate that while the plaintiff was on clinical observation, "[a]ll previous restrictions" of the BMP applied. (Escandell Aff. ¶ 4, Ex. 1.)

The plaintiff's 100% no property status continued until March 6, 2002, when defendant Wilmont authorized a "seg gown" for the plaintiff. It is not clear what a "seg gown" is. It is also not clear whether the "seg gown" was merely "authorized" for the plaintiff or whether it was

actually given to him. The plaintiff was also allowed a "styrofoam tray - no spoon" for meals. No other property was allowed in the plaintiff's cell.

On March 11, 2002, the plaintiff was released from observation, and his BMP was placed on inactive status.

However, on March 26, 2002, the plaintiff was again placed on clinical observation. He was placed on observation with "no items," except a "seg smock." (Escandell Aff. ¶ 14, Ex. 6.) The plaintiff was additionally allowed "styrofoam trays - no spoon" at meals. (*Id.*) He was released from clinical observation on March 29, 2002.

The defendants concede that clothing is a life necessity and that the Eighth Amendment requires that prison officials furnish adequate quantities to inmates. *See also Maxwell v. Mason*, 668 F.2d 361 (8th Cir. 1981) (court affirmed finding of cruel and unusual punishment where inmate had been held for fourteen days in solitary confinement in his undershorts and with no bedding except a mattress); *Kimbrough v. O'Neil*, 523 F.2d 1057 (7th Cir. 1975) (reversing dismissal of complaint where plaintiff placed in solitary confinement for three days without mattress, bedding, or blankets and without articles of personal hygiene); *Del Raine v. Williford*, 32 F.3d 1024, 1033 (7th Cir. 1994) (where a plaintiff is provided with adequate food, clothing, and sanitation, the conditions of solitary confinement do not on their face violate the Eighth Amendment).

According to the defendants, however, this case does not involve the plaintiff's placement on the BMP, "[f]or no sooner was Gillis placed on the BMP than he began exhibiting frightening acts of self-mutilation and threatening suicide. The removal of property from that point forward was not punitive, but necessary to protect Gillis from himself." (Defs.' Br. at 4.) The defendants further assert:

> Plainly, the motivation of prison officials in removing Gillis's clothing from March 1 to March 6 was to prevent him from harming himself not for the purpose of inflicting harm on him. Clothing can be ripped apart or otherwise used in a variety of creative ways for self-mutilation or even suicide. Moreover, Gillis has not complained of being cold or growing ill. The deprivation of clothing is a serious matter, but here it was justified and so did not violate the eighth amendment.

(*Id.* at 6.)

It is undisputed that once placed on the BMP, the plaintiff starting harming himself. The defendants aver that once this happened, they put the plaintiff on "clinical monitoring" for his protection. However, the conditions of his confinement on clinical monitoring were apparently identical to the conditions on the BMP.

There is a dispute over the injuries that the plaintiff suffered while on the BMP or clinical observation. In his sworn complaint, the plaintiff avers that he received bed sores from sleeping on bare concrete for thirteen days and that he injured his feet at night by pacing in his cell to keep warm. Although the defendants do not deny this outright, they contend that there is not evidence to support it.

On this record, the court cannot grant summary judgment to either party. It is settled that the conditions of confinement that the plaintiff endured while on the BMP/clinical observation implicate the Eighth Amendment right to be free from cruel and unusual punishment. However, there are factual disputes over the extent of the deprivations. Was the plaintiff naked pacing in his cell to keep warm for several days, with only a concrete slab to sleep on? Exactly what hygiene items did the plaintiff receive during this time and when did he receive them?

Additionally, the state of mind of the defendants is at issue. The defendants' contention that clinical observation trumped the BMP after March 1, 2002, at 9:00 p.m. does not jibe with the

undisputed facts that conditions did not change. In any event, the resolution of factual disputes on the exact conditions of the plaintiff's confinement as well as the extent his injuries may shed light on the defendants' state of mind. These are disputes that cannot be resolved on summary judgment.

The plaintiff also claims that he was placed on the BMP without due process of law, in violation of the Fourteenth Amendment. The Fourteenth Amendment does not "protect every change in the conditions of confinement having substantial adverse impact on the prisoner." *Sandin v. Conner*, 515 U.S. 472, 478 (1995). Rather, process is due only before changes that inflict an "atypical and significant hardship on the inmate in relation to the ordinary incident of prison life." *Id.* at 484.

Discipline in segregated confinement does not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest. *Id.* at 485; *see also Thomas v. Ramos*, 130 F.3d 754, 760-62 (7th Cir. 1997) (prison inmate's 70-day confinement in disciplinary segregation was not "atypical and significant" deprivation of prisoner's liberty and thus did not implicate liberty interest protectable under due process clause; prisoner has no liberty interest in remaining in the general prison population); *Thielman v. Leean*, 282 F.3d 478, 484 (7th Cir. 2002) (use of waist belts and leg chains during transport not atypical and significant deprivation); *Higgason v. Farley*, 83 F.3d 807 (7th Cir. 1996) (frequent placement in "lockdown" status, denial of educational programs).

Deprivations must be very serious to qualify as "atypical and significant." Despite this, courts have found atypical and significant deprivations. *See, e.g., Hanrahan v. Doling*, 331 F.3d 93, 98-99 (2d Cir. 2003) (per curiam) (under *Sandin* test, sentence of 120-month solitary confinement in special housing unit triggered due process protection); *Colon v. Howard*, 215 F.3d

227, 231-32 (2d Cir. 2000) (confinement for 305 days in standard administrative segregation conditions is atypical and significant hardship); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (prisoner's transfer to prison where conditions violate Eighth Amendment would impose atypical and significant hardship), *amended by* 135 F.3d 1318 (9th Cir. 1998).

It is undisputed that the plaintiff was placed on the BMP without any due process hearing. (Defs.' Resp. to Pl.'s Req. for Admis., No. 3.) However, the defendants do not really address this issue. Instead, they argue that the plaintiff was not entitled to disciplinary process before being placed on clinical observation status:

> If this were a case involving a true BMP, defendants would have presented facts demonstrating that the BMP was not intended to be punitive, and also demonstrated that traditional disciplinary methods had failed to bring plaintiff in compliance with the rules. However, as we have discussed, the restrictions associated with the BMP effectively ended immediately after they started when plaintiff displayed self-destructive and suicidal behavior. This case is about the conditions associated with clinical observation, not with stage one of a BMP.

(Defs.' Br. at 7-8.)

The defendants' contention that this case does not really involve the plaintiff's placement on the BMP is baffling. The defendants do not dispute that the plaintiff was initially placed on the BMP only. Subsequently, the plaintiff was placed on clinical observation to run concurrent to the BMP. Although clinical observation took precedence over the BMP, the restrictions of the two were the same. A different name was given to the same conditions. Whatever the defendants want to call it, the issue is whether the plaintiff was entitled to due process protections before the conditions of his confinement changed.

The ultimate issue of whether a hardship is atypical is one of law; however, if the factual circumstances creating the alleged denial of due process are reasonably in dispute, the jury must

resolve those facts before the law can be applied. *See Sealey v. Giltner*, 197 F.3d 578, 585 (2d Cir. 1999). The factual disputes described above preclude summary judgment for either party on this claim.

2. Access to the Courts Claim

Prisoners have a due process right of access to the courts and must be given a reasonably adequate opportunity to present their claims. *Bounds v. Smith*, 430 U.S. 817, 825 (1977). Such access must be effective and meaningful. *Id.* at 822. To succeed on a claim of denial of access to the courts, a plaintiff must show that any alleged interference caused actual injury and hindered efforts to pursue a legal claim respecting a basic constitutional right. *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

The actual-injury requirement applies even in cases "involving substantial systematic deprivation of access to court," including the "total denial of access to a library," or "an absolute deprivation of access to all legal materials." *Id.* at 353 n.4. Failure to identify some detriment that is linked to an adverse decision in, or inability to litigate, a case "is fatal . . . under any standard of sufficiency." *Martin v. Davies*, 917 F.2d 336, 340 (7th Cir. 1990) (giving as examples of prejudice "court dates missed" and "inability to make timely filings"). A long delay and inconvenience do not rise to a constitutional deficiency. *Campbell v. Miller*, 787 F.2d 217, 229 (7th Cir. 1986).

"Prisoners have a constitutional right of access to the courts that, by necessity, includes the right to pursue the administrative remedies that must be exhausted before a prisoner can seek relief in court." *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000); *see also Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995) (holding that prisoners' constitutional right of access to the courts "extends to established prison grievance procedures"). Since exhaustion under the PLRA is a

prerequisite to the filing of a § 1983 action concerning prison conditions, if prison officials prevent an inmate from exhausting they impede his access to the courts just a surely as if they prevent him from later filing his complaint. *Davis v. Milwaukee County*, 225 F. Supp. 2d 967, 975-76 (E.D. Wis. 2002) (citation omitted).

It is undisputed that on March 18, 2002, the plaintiff attempted to file an inmate complaint against defendant Hompe "for refusing to allow me to file a inmate complaint while on a behavior management plan for 13-days." (Trumm Aff. ¶ 7, Ex. 2.) The inmate complaint was returned to the plaintiff unfiled with a memo stating that pursuant to Wis. Admin. Code § DOC 310.09(2), only two complaints may be filed in any calendar week. On April 4, 2002, the plaintiff filed SMCI-2002-12001 against defendant Trumm regarding complaints returned because he had exceeded his limit of complaints allowed per week.

It is also undisputed that since writing materials are not allowed in the cell with an inmate on clinical observation or the BMP, the complaint deadline for inmates is extended. The ICE Office accepted four complaints from the plaintiff between March 18, 2002 and March 22, 2002. Although the plaintiff claims that the inability to file inmate complaints while on the BMP or clinical observation denied him access to the courts, he has failed to identify any specific grievance he was prevented from filing for that reason. He has also not indicated that his ability to litigate a legal claim was impeded. This omission is fatal to the plaintiff's claim. *See Ortloff v. United States*, 335 F.3d 652, 656 (7th Cir. 2003) (to state a right to access-to-courts claim, a prisoner must make specific allegations as to the prejudice suffered because of the defendants' alleged conduct). Therefore, the defendants' motion for summary judgment on this claim will be granted and the plaintiff's motion for summary judgment will be denied.

3. Retaliation Claim

An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution. *DeWalt*, 224 F.3d at 618 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977)). Prisoners have a Fourteenth Amendment due process right to adequate, effective, and meaningful access to the courts to challenge violations of their constitutional rights. *Bounds*, 430 U.S. at 821-22. Therefore, prison officials cannot hinder prisoners from this access or retaliate against prisoners who attempt to exercise that right. *Williams v. Lane*, 851 F.2d 867, 878 (7th Cir. 1988). Retaliation against a prisoner for his use of the courts or of the administrative complaint system may give rise to a valid cause of action under 42 U.S.C. § 1983. *See Black v. Lane*, 22 F.3d 1395, 1401 (7th Cir. 1994).

The retaliation inquiry should be undertaken "in light of the 'general tenor' of *Sandin*, which 'specifically expressed its disapproval of excessive judicial involvement in day-to-day prison management.'" *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (quoting *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995)). Thus, courts should "afford appropriate deference and flexibility" to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory. *Babcock*, 102 F.3d at 275.

To establish retaliation at the summary judgment stage, the plaintiff must demonstrate: 1) a chronology of events from which retaliation could be inferred; and 2) that retaliation was a substantial or motivating factor behind the defendants' conduct. *Babcock*, 102 F.3d at 276. Retaliatory motive may be inferred from the chronology of events. *Cain v. Lane*, 857 F.2d 1139, 1143 n.6 (7th Cir. 1988); *Murphy v. Lane*, 833 F.2d 106, 108-09 (7th Cir. 1987). The plaintiff's burden at the summary judgment stage is high. *Babcock*, 102 F.3d at 275. He "of course must

establish that his protected conduct was a motivating factor behind" the defendants' conduct, "but that should not end the inquiry." *Id.* The "ultimate question is whether events would have transpired differently absent the retaliatory motive." *Id.* Thus, unless the plaintiff can prove that he would not have been kept on Level 2 absent defendant Sharpe's retaliatory motive, there is no claim. *Id.*

The plaintiff claims that defendant Sharpe retaliated against him for filing administrative grievances by keeping the plaintiff on Level Two at WSPF. The defendants contend that the plaintiff cannot maintain a retaliation claim because defendant Sharpe followed procedures with regard to the plaintiff's appropriate level within WSPF, and as such, the plaintiff cannot demonstrate that defendant Sharpe held him at a lower level solely to retaliate against him.

It is undisputed that the plaintiff was held on Level Two from April 5, 2002 until October 7, 2002, due to his continual negative and disruptive behavior. It is also undisputed that on October 7, 2002, the plaintiff was demoted to Level One for disruptive and disrespectful behavior. Although the plaintiff alleged that defendant Sharpe retaliated against him for filing inmate complaints, the plaintiff has not shown that he would not have been held on Level Two absent a retaliatory motive. Therefore, the defendants' motion for summary judgment as to the plaintiff's retaliation claim against defendant Sharpe will be granted. The plaintiff's motion for summary judgment will be denied.

The plaintiff is also proceeding on a retaliation claim against defendant Hagan. He claims that defendant Hagan, along with Wilmot and Maier, refused to treat the plaintiff's medical condition in retaliation for filing grievances regarding severe side effects of a medication prescribed by Maier. The defendants contend that the plaintiff's retaliation claim against Hagan should be

dismissed because the plaintiff failed to exhaust administrative remedies against him. The plaintiff argues that he did exhaust administrative remedies against defendant Hagan, in inmate complaint SMCI-2002-20354.

The Prison Litigation Reform Act of 1995 (PLRA), Pub.L. 104-134, 110 Stat. 1321 (1996), provides in pertinent part that

> [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). Exhaustion of administrative remedies is a condition precedent to suit. *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002) (citing *Perez v. Wis. Dep't of Corrections*, 182 F.3d 532, 535 (7th Cir. 1999)). Section 1997e applies to "all inmate suits, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

The Inmate Complaint Review System within the Wisconsin prisons is the administrative remedy available to inmates with complaints about prison conditions or the actions of prison officials. Wis. Admin. Code § DOC 310.01(2)(a). The Wisconsin Administrative Code specifically provides that, before an inmate may commence a civil action, the inmate shall exhaust all administrative remedies that the DOC has promulgated by rule. Wis. Admin. Code § DOC 310.05. The Inmate Complaint Review System is available for inmates to "raise significant issues regarding rules, living conditions, staff actions affecting institution environment, and civil rights complaints." Wis. Admin. Code § DOC 310.08(1).

In order to use the Inmate Complaint Review System, an inmate must file a complaint with the inmate complaint examiner within fourteen days after the occurrence giving rise to the complaint. Wis. Admin. Code §§ DOC 310.07(1) & 310.09(6). Complaints submitted later than fourteen days after the event may be accepted for good cause. Wis. Admin. Code § DOC 310.09(6). After reviewing and acknowledging each complaint in writing, the inmate complaint examiner either rejects the complaint or sends a recommendation to the "appropriate reviewing authority." Wis. Admin. Code §§ DOC 310.11(2) & 310.11(11). The appropriate reviewing authority makes a decision within ten days following receipt of the recommendation. Wis. Admin. Code § DOC 310.12. Within ten days after the date of the decision, a complainant dissatisfied with a reviewing authority decision may appeal that decision by filing a written request for review with the corrections complaint examiner. Wis. Admin. Code § DOC 310.13(1). The corrections complaint examiner reviews the appeal and makes a recommendation to the secretary of the DOC. Wis. Admin. Code § DOC 310.13(6). The secretary may accept, adopt, or reject the corrections complaint examiner's recommendation, or return the appeal to the corrections complaint examiner for further investigation. Wis. Admin. Code § DOC 310.14(2).

The defendants aver that the plaintiff filed eleven inmate complaint during the period surrounding the claims made regarding his status on the BMP in March 2002: SMCI-2002-9507, 9508, 9911, 9916, 9917, 10410, 10748, 12001, 12828, 14358, and 21005. Of those eleven, eight complied with the requirements of the Wis. Admin. Code § DOC 310 and Administrative Directive 11.5. Three did not comply: SMCI-2002-9508, 10410, and 14358. The defendants aver that of the eight that did comply, the plaintiff did not complain or raise any issues about the conduct of defendant Hagan.

The plaintiff asserts that he exhausted administrative remedies as to defendant Hagan. (Pl.'s Br. at 9.) He has submitted a Corrections Complaint Examiner's Report dated July 23, 2002, regarding complaint SMCI-2002-20354. (Pl.'s Aff., unnumbered Ex. 1.) Although the actual inmate complaint has not been provided, the Report indicates that the "Nature of Complaint" is: "kc alleges Dr. Hagan is not treating him properly." (*Id.*) The Report recommends dismissal of the inmate complaint:

> The complainant states on appeal that he has been retaliated against by his "psychic" medication being discontinued and that he should not be housed at SMCI because he never received a court-ordered evaluation. Those issues were not part of the original complaint and are therefore not properly raised on appeal. The original complaint alleged lack of treatment for hearing voices and having thoughts of self-harm. As noted by the ICE, if the complainant is in need of treatment, he needs to convey his concerns to clinical services staff. Accordingly, it is recommended this complaint be dismissed.

(*Id.*)

It appears that the plaintiff has exhausted administrative remedies as to a retaliation claim against defendant Hagan. In any event, it certainly has not been established that he has not. Therefore, the defendants' motion to dismiss defendant Hagan based on failure to exhaust administrative remedies will be denied.

B. Defendants Bartels, Watters, and Maier's Motion

The defendants contend that the plaintiff fails to demonstrate that Bartels, Watters, and Maier violated his constitutional rights by being deliberately indifferent to his serious medical needs. According to the defendants, there is not evidence that the plaintiff suffered from a serious medical need with respect to his blood pressure, alleged rashes and foot sores, and any mental

illness. The defendants also contend that there is not evidence that Bartels, Watters, and Maier were deliberately indifferent to the plaintiff's needs.

The plaintiff contends that discovery is not yet completed and that there are "numerous issues relating to these defendants that have not been answered." (Pl.'s Mot. in Opp'n at 1.) He requests that the court reject the defendants' arguments concerning no evidence of a serious medical need, blood pressure, rashes and foot sores, and mental illness.

To establish liability under the Eighth Amendment, a prisoner must show: (1) that his medical need was objectively serious; and (2) that the official acted with deliberate indifference to the prisoner's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Chapman v. Keltner*, 241 F.3d 842, 845 (7th Cir. 2001); *see also Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Zentmyer v. Kendall County, Ill.*, 220 F.3d 805, 810 (7th Cir. 2000).

A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir. 2001) (quoting *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997)). Factors that indicate a serious medical need include "the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *Gutierrez*, 111 F.3d at 1373 (citations omitted). A medical condition need not be life-threatening to qualify as serious and to support a §1983 claim, providing the denial of medical care could result in further significant injury or in the unnecessary infliction of pain. *See Reed v. McBride*, 178 F.3d 849, 852-53 (7th Cir. 1999); *Gutierrez*, 111 F.3d at 1371.

A prison official acts with deliberate indifference when "the official knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Prison officials act with deliberate indifference when they act "intentionally or in a criminally reckless manner." *Tesch v. County of Green Lake*, 157 F.3d 465, 474 (7th Cir. 1998). Neither negligence nor even gross negligence is a sufficient basis for liability. *See Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir. 1991). A finding of deliberate indifference requires evidence "that the official was aware of the risk and consciously disregarded it nonetheless." *Chapman v. Keltner*, 241 F.3d 842, 845 (7th Cir. 2001) (citing *Farmer*, 511 U.S. at 840-42).

In determining whether an official's conduct rises to the deliberate indifference standard, a court may not look at the alleged acts of denial in isolation; it "must examine the totality of an inmate's medical care." *Gutierrez*, 111 F.3d at 1375. In *Gutierrez*, isolated incidents of delay, during ten months of prompt, extensive treatment did not amount to deliberate indifference. *Id.* Similarly, in *Dunigan v. Winnebago County*, 165 F.3d 587, 591 (7th Cir. 1999), "factual highlights" of neglect over a month and a half of otherwise unobjectionable treatment were insufficient to avoid summary judgment.

The court will first address the plaintiff's argument that discovery is not yet completed and that there are numerous issues that have not yet been answered. On June 17, 2004, the court denied the plaintiff's May 7, 2004 and June 2, 2004, motions to compel discovery. In his motions, the plaintiff requested that defendants Maier, Watters, and Bartels be ordered to provide him with certain interrogatories, documents, and admissions. These defendants responded to the plaintiff's discovery requests. They objected to some of the requests as vague, overly broad, indefinite, and unduly burdensome and, with respect to other requests, they advised the plaintiff that the

information was available for review upon request pursuant to institution policy. The defendants' answers and objections to the plaintiff's discovery requests were reasonable. (Order of June 17, 2004, at 2.) The court will now address the merits of the plaintiff's claims.

The undisputed facts indicate that the plaintiff complained about several medical conditions between February 15, 2002, the date he was transferred to WSPF, and June 11, 2002. The facts also indicate that the plaintiff's complaints were answered. On February 18, 2002, the plaintiff was evaluated and diagnosed with dry flaky skin. A therapeutic ointment was prescribed and the plaintiff received this treatment daily, as prescribed, unless he refused. Defendant Watters visited the plaintiff on March 6, 2002, to assess the plaintiff's complaints and noted in the medical chart, "no rash or alteration in skin integrity." (Knott Aff. ¶ 10, Ex. D.)

On March 1, 2002, the day he was placed on the BMP, the plaintiff requested to see a nurse, complaining of chest pain and when she responded he requested eye drops. On March 15, 2002, the plaintiff made another complaint of chest pain and numbness. He was promptly seen and evaluated and the nurse found him not to be in need of treatment. On March 16, 2002, the plaintiff complained of elevated blood pressure but refused to come out of his cell to be evaluated when a staff nurse went to see him. On March 22, 2002, the plaintiff again complained of chest pain and high blood pressure. The staff nurse who went to assess the plaintiff found his blood pressure to be elevated, administered medication, and notified the physician's assistant. Thirty minutes later, the plaintiff's blood pressure had returned to normal levels.

Concerning the plaintiff's mental health, it is undisputed that he was seen and evaluated by Dr. Maier on March 5, 2002. Dr. Maier concluded that the plaintiff was having problems adjusting to the conditions but did not warrant further treatment at that time. Dr. Maier saw the plaintiff again

on March 19, 2002, diagnosed depression, and prescribed Celexa to treat the plaintiff's symptoms. Dr. Maier saw the plaintiff again on April 2, April 9, and June 11, 2002. On the June 11 visit, Dr. Maier substituted Prozac for Celexa because the plaintiff complained of side effects with Celexa. Dr. Maier discontinued the prescription for Prozac on July 2, 2002, upon learning that the plaintiff was not taking the required doses, thereby eliminating any therapeutic effects of the medication.

The record reveals that the plaintiff received medical treatment in response to his complaints. There is no indication that the defendants were deliberately indifferent to his medical needs. Disagreement with medical professionals about treatment needs does not state a cognizable Eighth Amendment claim under the deliberate indifference standard of *Estelle v. Gamble*, 429 U.S. 97 (1976). *Ciarpaglini v. Saini*, 352 F.3d 328, 331 (7th Cir. 2003). Accordingly, the defendants' motion for summary judgment on the plaintiff's Eighth Amendment medical care claim will be granted.

The plaintiff is also proceeding on a retaliation claim against defendants Wilmont and Maier for refusing to treat the plaintiff's medical condition in retaliation for filing grievances regarding severe side effects of a medication prescribed by Maier. As described above, on March 19, 2002, Maier prescribed Celexa for the plaintiff's depression. Defendant Maier saw the plaintiff on April 2, April 9, and June 11, 2002. On the last visit, Maier substituted Prozac for Celexa because of side effects with the Celexa. On July 2, 2002, Maier discontinued the Prozac because he learned that the plaintiff was not taking the required doses.

On these undisputed facts, a retaliation claim against defendants Wilmont and Maier cannot be sustained. Therefore, the defendants are entitled to summary judgment regarding the plaintiff's retaliation claim.

CONCLUSION

Defendants Bartels, Watters, and Maier's motion for summary judgment will be granted and the plaintiff's motion for summary judgment will be denied. Also, the plaintiff's motion for default judgment will be denied.

Defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont's motion for summary judgment will be granted in part and denied in part. The motion will granted as to the plaintiff's access to the courts claim and, in part, his retaliation claim. The defendants' motion to dismiss defendant Hagan for failure to exhaust will be denied and therefore an unaddressed retaliation claim remains against defendant Hagan. The defendants' motion for summary judgment will be denied as to the plaintiff's Eighth Amendment claim regarding the conditions of confinement of the BMP/clinical observation and that the plaintiff was subjected to those conditions without due process of law.

THEREFORE, IT IS ORDERED that the defendants Litscher, Berge, Hompe, Sharpe, Hagan, Coon, and Wilmont's motion for summary judgment (Docket #185) is **GRANTED IN PART AND DENIED IN PART** as described herein.

IT IS FURTHER ORDERED that the defendants Bartels, Watters, and Maier's motion for summary judgment (Docket #193) is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment (Docket #197) is **DENIED**.

IT IS FURTHER ORDERED that the plaintiff's motion for default judgment (Docket #207) is **DENIED**.

IT IS FURTHER ORDERED that defendants Bartels, Watters, and Maier are dismissed from this action.

In light of the fact that plaintiff's Eighth Amendment and Due Process claims have survived defendants' motion for summary judgment, the court will consider anew whether counsel should be appointed to represent plaintiff in this matter. If counsel is appointed, the court will promptly notify the parties. In any event, the clerk shall set this matter on the court's calendar for further scheduling after 30 days.

Dated this 31st day of March, 2005.

s/ William C. Griesbach
William C. Griesbach
United States District Judge