# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

STANLEY CARTER LIGGINS.

:

Plaintiff, :

No. 4-00-CV-90080

VS.

: REPORT AND RECOMMENDATION
MAGGIE BARNETT, RALEIGH : ON DEFENDANTS' MOTIONS FOR
HELMICK, LEONARD GRAVES, : SUMMARY JUDGMENT

JIM HELLING, ROGER LAWSON, RICHARD BARLOW, VICTORIA PEDERSON, and JIM TRIPP,

:

Defendants.

This matter comes before the Court on Defendant Maggie Barnett's Motion for Summary Judgment (Clerk's No. 25); Defendants Raleigh Helmick, Leonard Graves, and Jim Helling's Motion for Summary Judgment (Clerk's No. 31); and Plaintiff Stanley Carter Liggins' Motion to Dismiss (Clerk's No. 49)<sup>1</sup>. Liggins, an inmate at Iowa State Penitentiary (ISP), Fort Madison, Iowa, brings this action under 42 U.S.C. § 1983, asserting claims for deliberate indifference to his serious medical needs and retaliation, which allegedly led to his placement in segregation. Liggins seeks compensation for each day after December 20, 1999, that he was in segregation, \$10 from each Defendant, and injunctive relief, including a program to teach Defendants Barnett and Helmick how to deal with people, and assurance that Barnett will never again provide his medical screening.

In her Motion, filed December 26, 2000, Barnett asserts she is entitled to summary judgment because she was not deliberately indifferent to Liggins' serious medical needs, she did not retaliate

<sup>&</sup>lt;sup>1</sup> In his Amended Complaint, filed April 6, 2000, Liggins alleged that since January 2000, Defendants Lawson, Barlow, Pederson and Tripp had denied him medical treatment for blisters and warts, and blood in his stool, and had placed him in lockup when he complained about lack of treatment for his condition. Defendants did not address these claims in their Motions for Summary Judgment, and on April 10, 2001, Liggins filed a Motion to Dismiss the claims, (Clerk's No. 49), which Defendants have not resisted. After reviewing the pleadings, the court respectfully recommends that these claims be dismissed.

against him, and she is entitled to qualified immunity. In their Motion, filed January 23, 2001, Helmick, Graves, and Helling maintain they are entitled to judgment as a matter of law on Liggins' retaliation claims; the Prison Litigation Reform Act (PLRA), effective April 26, 1996, 42 U.S.C. § 1997e, bars recovery because Liggins suffered no physical injury and failed to exhaust his administrative remedies; and Defendants are entitled to qualified immunity.

The case was referred to a United States Magistrate Judge on July 6, 2000, for a Report and Recommendation under 28 U.S.C. § 636(b)(1)(B). Liggins filed a Resistance to Defendants' Motions for Summary Judgment on February 26, 2001, and a supporting Affidavit on March 6, 2001. This matter is fully submitted. After carefully considering the evidence in the record and the memoranda submitted by the parties, the court finds and recommends as follows on the issues presented.

## STANDARDS FOR SUMMARY JUDGMENT

A court grants a motion for summary judgment when the record, viewed in a light most favorable to the nonmoving party, shows that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986); *Williams v. Kelso*, 201 F.3d 1060, 1065 (8th Cir. 2000). To avoid summary judgment, the nonmoving party must, "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Crowley v. Hedgepeth*, 109 F.3d 500, 502 (8th Cir. 1997).

The moving party bears the initial burden of informing the court of its basis for the motion and identifying the parts of the record that show lack of a genuine issue. *Celotex*, 477 U.S. at 323. To defeat a motion for summary judgment, the nonmoving party must go beyond the pleadings and establish "by affidavits, or by the depositions, answers to interrogatories, and admissions on file," that specific facts show a genuine issue for trial exists. *See* Fed R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324.

When considering a claim of deliberate indifference to a serious medical need under 42 U.S.C. § 1983, a district court's entry of summary judgment is appropriate when the plaintiff has produced insufficient evidence from which a jury could infer that the plaintiff suffered objectively serious medical needs, and that the defendants actually knew of, but deliberately disregarded, his serious medical needs. *See Anderson*, 477 U.S. 248-49; *Williams*, 201 F.3d at 1064; *Boyd v. Knox*, 47 F.3d

966, 968 (8th Cir. 1995).

#### MATERIAL FACTS NOT IN DISPUTE

The following facts are either not in dispute or are those viewed in the light most favorable to Liggins.

Beginning on approximately Thursday, December 16, 1999, Liggins felt sick. At the time, he was in the general prison population. Liggins complained about his symptoms and sought medical assistance. Liggins did not, however, follow ISP's established sick-call procedure for an inmate to get a doctor's appointment at the Health Care Unit, and he did not get an appointment.

On Saturday, December 18, a correctional officer told Defendant Barnett, a registered nurse, that Liggins was ill. Barnett told the officer to have Liggins follow ISP's procedure for making a sick call. Defendants contend, and Liggins does not dispute, that Liggins did not follow ISP's procedure that day or the next for making a sick call. Instead, on Sunday, December 19, Liggins gave a note to another inmate to give to Leroy Gully, the shift captain, asking for medical assistance. In the note, Liggins stated as follows:

I've been trying to receive medical treatment for approximately 5 days. I got bad headaches, my eyes hurt, throat so[re], and a real nasty cough. I haven't had anything to[] eat since [T]hursday. When I stand up I fe[e]l faint. When or if you approve my seeing a doctor, or nurse, please send a wheelchair.

Defs. Helmick, Graves, and Helling's Ex. C at 4.

Nurse Barnett received the note from Gully at approximately 9 a.m. on December 19. Barnett reviewed Liggins' medical chart. The chart showed that an ISP doctor had last seen Liggins on December 2, and told him to take Tylenol as needed for headaches. Barnett noted Liggins made no attempts after the December 2 appointment to follow ISP's sick-call procedure to arrange a visit to the Health Care Unit.

Barnett made an appointment for Liggins to visit the Health Care Unit the next day, December 20, at 8:30 a.m. In her affidavit, Barnett states, "Liggins was further instructed by ISP officials to follow sick call procedure in the future or he would be returned to his cell." (Barnett Aff. at 2.)

After walking to the Health Care Unit at 8:30 a.m. on December 20, Liggins had to wait about an hour to be seen. In his Complaint, Liggins stated he found this wait understandable because other inmates were ahead of him. (Compl. at 4.)

Nurse Barnett saw Liggins at approximately 9:30 a.m. At Barnett's request, Liggins weighed himself. Liggins asserts that before he could tell the nurse what was wrong with him, she confronted him and berated him for not following sick-call procedures. Barnett concedes she told the inmate that in the future, he needed to follow ISP's sick-call procedure to schedule a visit to the Health Care Unit. She also said that forwarding a note to the shift captain was not proper sick-call procedure. Barnett asserts, but Liggins denies, that the inmate became very angry and argumentative, raised his voice, and told her she did not know everything just because she was a nurse.

The nurse contends, but Liggins denies, that she checked and recorded Liggins' temperature, blood pressure, pulse and respiration. Barnett claims she did not believe that Liggins was very ill or needed immediate doctor's attention. The nurse asserts, and Liggins denies, that she told Liggins she thought he had the flu. Liggins does not claim his symptoms were escalating. He does not maintain he felt faint during the screening, when he weighed himself, or when he walked in and out of the screening room. Liggins requested an immediate appointment with the prison physician, but Barnett told the inmate he would have to wait his turn to see the doctor.

Liggins saw Defendant Helling, Deputy Warden, who is in charge of the infirmary and who is a registered nurse, and complained to him about Barnett's not allowing him to see the ISP physician immediately. Helling listened to Liggins describe his symptoms and observed him. Helling noted Liggins was loud and agitated but did not appear to need immediate medical attention. Helling told Liggins he probably had the flu, and that he needed to calm down and wait to be seen by the doctor. Helling left without trying to get Liggins an immediate doctor's appointment.

Liggins claims that after Helling left the area, Barnett approached Liggins and screamed at him for going over her head and complaining to Helling. Barnett denies she ever screamed at Liggins. The nurse asserts that Liggins continued speaking to her in a threatening and intimidating manner, which Liggins denies. Kris Towlerton, a registered nurse who works at the Health Care Unit, stated in her affidavit that she heard Liggins shouting and being disruptive in the Health Care Unit shortly before 11 a.m. on December 20, 1999.

Barnett told Liggins to leave the screening room. The inmate maintains he complied with Barnett's request. The nurse asserts that Liggins refused to leave, and continued arguing with her and shouting. Liggins was not shackled or attended by a correctional officer. Barnett stated she called

Officer Roger Hingst to help, and Liggins left the screening room when he saw the officer.

Barnett told Liggins to sit in the waiting room until the prison's physician, Dr. Kenneth Caldwell, was available to examine him. The inmate asserts, but Barnett denies, that the nurse told him he would be the last person to see the doctor. Liggins further claims that Barnett passed through the waiting area three times, smiling at him each time. Barnett counters that she was not smiling at Liggins, but at the next inmates she was calling in to see the doctor.

Towlerton testified in her affidavit that when the Health Care Unit is busy, as it was on December 20, 1999, it is not uncommon for an inmate to wait over an hour to see the doctor. Barnett asserts that many inmates waiting to see Dr. Caldwell that day had medical needs significantly more serious than Liggins' medical need.

Towlerton stated in her affidavit that ISP medical providers, including nurses, commonly send disruptive inmates back to their cells and reschedule a visit with the physician, unless the inmate's medical need is serious.

Liggins waited approximately 1½ hours, and then, he claims, he fainted and struck his head as he fell. Liggins does not allege that he suffered any bruises, cuts, bleeding, or other injury as a result of striking his head. At approximately 11 a.m., Officer Hingst called Towlerton to the waiting room to assist with the fallen Liggins. Towlerton stated in her affidavit that Liggins stood up and got into a wheelchair without assistance. His vital signs were stable. Towlerton stated in her affidavit that she believed Liggins had not fainted, but had staged the fainting incident to receive immediate medical attention. She further stated that at all times during Liggins' visit to the Health Care Unit on December 20, his temperature was under 100 degrees Fahrenheit.

Dr. Caldwell saw Liggins at approximately 11:15 a.m., diagnosed him as having the flu, and prescribed an antibiotic, decongestant, expectorant, and aspirin. (Towlerton Aff. at 3.) No evidence indicates the doctor provided treatment for any injury Liggins might have suffered when he fainted. Dr. Caldwell did not admit Liggins to the infirmary, but returned him to his cell. *Id*.

On December 20, Barnett wrote a disciplinary notice alleging that Liggins became angry and argumentative in the Health Care Unit, spoke to her in a threatening manner, and refused to obey her orders to leave and to stop talking to her. (Defs. Helmick, Graves, and Helling's Ex. C at 1.) Officers escorted Liggins from his cell to summary segregation in Cellhouse 219. The same day, Liggins

alleges, he wrote a grievance concerning Barnett, but he never received an answer to the grievance. In his Answers to Interrogatories, Helling stated that his files contained no grievances from Liggins regarding the allegations in his Complaint. (Defs. Helmick, Graves, and Helling's Ex. E at 11.)

The Iowa Department of Corrections' (IDOC) grievance policy entitles all inmates, regardless of administrative status, to grieve prison policies and conditions, and actions by employees and inmates. (Defs. Helmick, Graves, and Helling's Ex. F at 1.) Inmates submit grievances through unit managers and counselors, who route the grievances to the grievance officer. The grievance officer files each grievance in a confidential file separate from the inmate's master file. Policy provides that staff and inmates should have no access to the records except as necessary for clerical processing, grievance resolution, or compliance monitoring. *Id.* at 3.

Once the grievance officer receives a grievance, he notifies the inmate in writing within seven days, except in an emergency, that the grievance was received, and about the plan for attempted resolution of the grievance. Within 14 days, the grievance officer or committee must ensure an initial written response in one of the following ways: "(1) Investigation and response. (2) Refer to appropriate staff for investigation and response (emergency only). (3) Convene a Grievance Hearing Committee and prepare an investigation . . . . (4) Specific reasons for decisions.

(5) Right to appeal statement and place of appeal." *Id.* at 4. If the 14 days expires before the inmate receives an initial response, he usually may initiate the first appeal step, which is to the warden or his designee. Within 90 days of receiving a grievance, prison officials must provide a final decision on the grievance.

When a prison employee is a subject of a complaint, the grievance policy precludes the employee from participating in resolution of the grievance. *Id.* at 2. The policy prohibits retaliation against an inmate for filing a grievance. *Id.* at 3. If retaliation occurs, the inmate can grieve the retaliation directly to the IDOC's central office. *Id.* 

On December 22, 1999, after a hearing held on the disciplinary notice that Barnett wrote against Liggins, an administrative law judge (ALJ) found Liggins guilty of disobeying a lawful order. (Defs. Helmick, Graves, and Helling's Ex. C at 5.) The ALJ imposed a sentence of loss of 16 days good time, and 15 days of disciplinary detention, which he suspended for 90 days based on Liggins' prior good conduct. *Id.* Liggins appealed the decision.

Liggins asserts that on December 22, Defendant Lt. Helmick came to his cell, said that Barnett was Helmick's friend, and, using profanity, said that the inmate should not cause trouble for the nurse. Liggins told Helmick that if Barnett was not doing her job, he would file another grievance against her. The inmate contends that Helmick said he had the grievance Liggins wrote against Barnett on December 20, (Liggins Aff. at 2), and added, "I run this building," (Compl. at 7), and left.

Liggins maintains that following this encounter, he filed a grievance against Helmick and sent a memorandum to Deputy Warden Helling and another to Warden Leonard Graves. (Liggins Aff. at 2.) The record does not indicate the date on which Liggins wrote the grievance and memoranda. The court will assume for purposes of this Report and Recommendation that Liggins wrote the grievance and memoranda on December 22, 1999.

On December 28, 1999, Executive Assistant Ron Welder denied Liggins' appeal of the ALJ's December 22 disciplinary decision. (Defs. Helmick, Graves, and Helling's Ex. C at 8.)

Liggins, still in segregation, received his initial segregation review when the classification committee met on December 28. Helmick went to Liggins' cell to escort him to the review. Prison policy requires that a segregated inmate undergo a strip search before leaving his cell. As guards were searching Liggins, the inmate claims, Helmick tore up Liggins' two grievances and memoranda (presumably the grievances Liggins wrote on December 20 against Barnett and on December 22 against Helmick, and the two memoranda he wrote on December 22) in front of him, while telling the inmate he would stay in lock-up status for a while. Helmick, in contrast, denies tearing up, or even knowing about, the grievances and memoranda. (Defs. Helmick, Graves, and Helling's Ex. E at 25.) He asserts that Liggins was argumentative and refused to be searched.

Liggins did not appear at the segregation review hearing; Helmick told the classification committee that Liggins had refused to be searched and was argumentative. As a result, the committee assigned Liggins to AS 9, the most restrictive of nine levels in administrative segregation, although otherwise, he "probably would have returned to general population this date." *Id.* at 1. The committee set Liggins' next review date for January 27, 2000.

Prison policy provides that inmates may appeal classification committee decisions to the warden or his designee. (Defs. Helmick, Graves, and Helling's Ex. G at 3.) Because an inmate may

appeal a classification decision, he may not write a grievance concerning the decision. (Defs. Helmick, Graves, and Helling's Ex. F at 1-2.)

#### **CONCLUSIONS OF LAW**

# I. Claims Against Defendant Barnett

Liggins alleges that Nurse Barnett violated his Eighth Amendment right to be free from cruel and unusual punishment by denying him immediate attention from Dr. Caldwell, thus depriving him of prompt and appropriate treatment for his serious medical need.

He also claims Barnett failed to provide adequate medical care in retaliation for Liggins' attempt to get medical attention by sending a note to the shift captain, rather than by using the sick-call procedure. Liggins further asserts the nurse wrote a disciplinary report in retaliation for Liggins' complaints to her superiors.

#### A. Deliberate Indifference to Serious Medical Need

The Eighth Amendment, in prohibiting prison officials' cruel and unusual punishment of inmates in their custody, obligates the officials to provide medical care to inmates. *Tlamka v. Serrell*, 244 F.3d 628, 632-33 (8th Cir. 2001) (citing *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976)). To succeed on this claim, Liggins must establish the alleged deprivation was, objectively, sufficiently serious, and that Barnett subjectively knew of the serious medical need and refused to address it, that is, that she was deliberately indifferent to his serious medical need. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Moore v. Jackson*, 123 F.3d 1082, 1086 (8th Cir. 1997); *Crowley*, 109 F.3d at 502. A prisoner's disagreement with the course of treatment provided to him does not alone suffice to allege a serious medical need to which prison officials were deliberately indifferent. *Kayser v. Caspari*, 16 F.3d 280, 281 (8th Cir. 1994).

## 1. Serious Medical Need

A medical condition constitutes a serious medical need when it has been so diagnosed by a physician or is "so obvious even a layperson would recognize the necessity for a doctor's attention." *Johnson v. Busby*, 953 F.2d 349, 351 (8th Cir. 1991). A plaintiff's self-diagnosis alone cannot establish that he suffers from a serious medical need, when the medical evidence does not support his self-diagnosis. *Kayser*, 16 F.3d at 281. Not "every ache and pain or medically recognized condition

involving some discomfort can support an Eighth Amendment claim." *Gutierrez v. Petters*, 111 F.3d 1364, 1372 (7th Cir. 1997).

No evidence shows that a physician diagnosed Liggins' flu-like symptoms as a serious medical need requiring immediate emergency attention from a doctor. Liggins does not contend his symptoms included vomiting, diarrhea, or high fever.

The court has found no case in which a plaintiff suffering from flu-like symptoms such as Liggins' symptoms has been held to have had a serious medical need. On the contrary, courts have held such symptoms do not constitute a serious medical need. See Schwartz v. Jones, No. 99-3269, 2000 WL 1859012, at \*3 (E.D. La. Dec. 18, 2000) (holding "flu-like symptoms" and head cold were not serious medical need, and prison officials' failure to provide inmate with aspirin, cold medicine and cough drops for such symptoms did not rise to level of federal constitutional claim for denial of medical care; granting defendants' motion for summary judgment); Haberstick v. Nesbitt, No. Civ. A. 97-6523, 1998 WL 472447, at \*3 (E.D. Pa. July 29, 1998) (holding former inmate's flu, foot injury, back and side injury, asthma, and breathing problems could not form basis of Eighth Amendment claim for deliberate indifference to serious medical need, when plaintiff presented no evidence his flu and other ailments were serious medical needs); cf. George v. Associated Stationers, 932 F. Supp. 1012, 1015 (N.D. Ohio 1996) (noting federal regulations promulgated under Family Medical Leave Act (FMLA) ordinarily excluded the common cold, flu, ear aches, upset stomach, and certain other ailments from definition of "serious medical condition"); Procopio v. Castrol Indus. North America, Inc., Civ.A. No. 96-5234, 1996 WL 684244 (E.D. Pa. Nov. 21, 1996) (holding employee's brief episode of flu-like symptoms did not meet requirements of serious medical condition under FMLA, when employee felt ill and sat down, supervisor found him unconscious, and employee had flu-like symptoms).

Liggins offered no evidence that his condition was so obvious that even a layperson would recognize the necessity for a doctor's immediate attention. *See Johnson*, 953 F.2d at 350. The court finds that Liggins' self-diagnosis does not alone establish that he suffered from a serious medical need requiring immediate doctor's attention. *See Kayser*, 16 F.3d at 281.

When an inmate alleges that treatment delay is the constitutional deprivation, the objective seriousness of the deprivation should be measured by reference to the delay's effect. *Crowley*, 109

F.3d at 502. The inmate must put verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment. *Id.* (citing *Hill v. Dekalb Regional Youth Detention Ctr.*, 40 F.3d 1176, 1188 (11th Cir. 1994)); *Reece v. Groose*, 60 F.3d 487, 491 (8th Cir. 1995). Specifically, the inmate must present "verifying medical evidence . . . that defendants ignored an acute or escalating situation or that delays adversely affected his prognosis." *Reece*, 60 F.3d at 491; *see Sherrer v. Stephens*, 50 F.3d 496, 497 (8th Cir. 1994).

Liggins has provided no verifying medical evidence to establish the detrimental effect of delay in medical treatment for his flu symptoms. Liggins provided no evidence that his fainting was the result of waiting 1½ hours to see Dr. Caldwell. The doctor did not prescribe any treatment or medicine to prevent fainting; he prescribed medicine for Liggins' flu symptoms. No evidence indicates that getting the prescriptions 1½ hours earlier would have forestalled Liggins' fainting. Liggins offers no expert testimony that suggests the necessity of an immediate doctor's appointment as treatment for his flu symptoms, or for reduction of his symptoms. The court finds that Liggins has not provided sufficient evidence to generate a fact issue concerning whether he needed immediate emergency medical care; and the 1½ hours he waited to see the doctor does not rise to the level of an Eighth Amendment claim. *Cf. Williams v. Department of Corrections*, 208 F.3d 681, 682 (8th Cir. 2000) (holding claim regarding denial of skin medication for 10 hours and 40 minutes was frivolous, when delay in receiving medication caused inmate to suffer burning sensation).

The court respectfully recommends that Defendant Barnett's Motion for Summary Judgment be granted, because Liggins has not raised a genuine dispute of fact from which a trier of fact could conclude he had an objectively serious medical condition to the extent of requiring immediate attention from a doctor, and because he has produced no verifying medical evidence to establish the detrimental effect of a 1½-hour delay in medical treatment.

## 2. Deliberate Indifference

Even assuming Liggins' condition presented a serious medical need, not every prisoner's claim of inadequate medical treatment constitutes an Eighth Amendment violation. An inadvertent failure to provide adequate medical treatment, which amounts to negligence, does not state a valid claim of cruel and unusual punishment. *Estelle*, 429 U.S. at 106; *Stephens v. Johnson*, 83 F.3d 198, 201 (8th Cir. 1996) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). A plaintiff must show more than

even gross negligence to rise to the level of a constitutional violation. *Jolly v. Knudsen*, 205 F.3d 1094, 1096 (8th Cir. 2000).

To establish an Eighth Amendment claim, a plaintiff must show that prison officials acted with a sufficiently culpable state of mind. *Choate v. Lockhart*, 7 F.3d 1370, 1373 (8th Cir. 1993); *Benter v. Peck*, 825 F. Supp. 1411, 1417 (S.D. Iowa 1993). When a plaintiff produces evidence that only raises a question of medical judgment, deliberate indifference is not shown, and the defendants are entitled to summary judgment. *See Sherrer*, 50 F.3d at 497 ("Physicians are entitled to exercise their medical judgment"); *Kayser*, 16 F.3d at 281; *Noll v. Petrovsky*, 828 F.2d 461, 462 (8th Cir. 1987) (per curiam).

A careful review of the record reveals no evidence showing Barnett knew or should have known at the relevant time that an immediate doctor's appointment was medically necessary treatment for Liggins' symptoms. *See Reece*, 60 F.3d at 492 (stating issue in deliberate-indifference analysis was what defendant "knew or should have known at the relevant time"); *Stetter v. Riddick*, No. 99-1435, 2001 WL 306099, at \*1 (8th Cir. Mar. 30, 2001) (table) (affirming Southern District of Iowa Court's grant of summary judgment to jail administrator; holding while, in hindsight, administrator should have taken arrestee to doctor more promptly, his failure to act sooner was not constitutional violation, when administrator took arrestee to doctor after arrestee complained for two days about ribs hurting and difficulty in breathing, and subsequent x-ray showed collapsed lung). Liggins did not tell Barnett he felt faint, or that his symptoms were acute or escalating. He had no problem weighing himself, walking, and talking. Barnett determined a doctor's immediate attention was not medically necessary. Helling, who observed Liggins and listened to him describe his symptoms, also did not believe that immediate access to a doctor was medically necessary under the circumstances.

Barnett provided Liggins an appointment with Dr. Caldwell the same day she saw Liggins. Barnett had discretion to arrange for Liggins to see Dr. Caldwell immediately, to have Liggins wait his turn to see Dr. Caldwell that day, or to return the inmate to his cell. Evidence indicates that other inmates waiting to see Dr. Caldwell had medical needs more serious than Liggins' medical need. Towlerton stated in her affidavit that Liggins' waiting over an hour to see the doctor was not

uncommon given the large number of waiting inmates.<sup>2</sup> The court finds that Barnett exercised her discretion within Eighth Amendment constraints.

Furthermore, much of the delay Liggins experienced in seeing a doctor is attributable to Liggins' initial actions in not following ISP's sick-call procedure. *See Hill*, 40 F.3d at 1189 (holding supervisor was not deliberately indifferent to juvenile detainee's medical needs because of four-hour delay in transporting juvenile to hospital, when greatest delay in medical treatment was attributable to juvenile waiting approximately seven hours to report blood smear, and transportation delay did not detrimentally exacerbate medical problem, which was not serious medical need to extent of requiring immediate emergency care) (cited in *Williams v. Kelso*, 201 F.3d 1060, 1065 (8th Cir. 2000)); *Haberstickt*, No. Civ.A. 97-6523, 1998 WL 472447, at \*4 (holding no evidence showed defendants exercised deliberate indifference towards plaintiff's medical needs by delaying necessary treatment; plaintiff delayed his hernia surgery by refusing to allow doctor to perform surgery until plaintiff was satisfied that doctor was qualified to perform such surgery).

In addition, Liggins provides no evidence that Barnett's decision to have Liggins wait his turn to see Dr. Caldwell "so deviated from professional standards that it amounted to deliberate indifference." *Czajka v. Caspari*, 995 F.2d 870, 872 (8th Cir. 1993).

The court finds the evidence is insufficient to supply an inference of deliberate indifference. Considering the nature of Liggins' symptoms and the prison's need to provide a physician's attention to other waiting inmates, Barnett's actions were not so inappropriate as to evidence intentional maltreatment or refusal to provide essential care. *See Dulany v. Carnahan*, 132 F.3d 1234, 1240-41 (8th Cir. 1997). Getting a doctor's immediate attention was Liggins' self-diagnosis and prescription, rather than the medical staff's determination of needed medical care for Liggins' symptoms. Liggins' disagreement with the choice of medical care provided does not establish deliberate indifference. *See Kayser*, 16 F.3d at 281.

The court finds that Liggins has failed to set forth sufficient evidence from which a trier of fact could conclude Barnett was deliberately indifferent to Liggins' serious medical needs. Therefore, the court respectfully recommends that Barnett's Motion for Summary Judgment be granted on this

<sup>&</sup>lt;sup>2</sup> The record does not indicate how long Liggins' wait would have been had he not fainted.

issue.

#### **B.** Retaliation Claims

Liggins asserts two retaliation claims against Barnett. First, the inmate alleges Barnett refused to provide adequate medical care, including making him wait over an hour to see the doctor, in retaliation for Liggins' attempt to get medical attention by sending a note to the shift captain, rather than use the sick-call procedure.

When an inmate brings a retaliatory discipline claim, the inmate has a heavy burden of proving that, but for the unconstitutional, retaliatory motive, discipline would not have been imposed *See Rouse v. Benson*, 193 F.3d 936, 940 (8th Cir. 1999); *Goff v. Burton*, 7 F.3d 734, 736-38 (8th Cir. 1993). Finding that an impermissible retaliatory motive was a factor in the disciplinary decision is insufficient to establish a claim in a prisoner discipline case. *Goff*, 7 F.3d at 738.

Barnett observed Liggins walking and talking, reviewed his medical records, and read Liggins' December 18, 1999, note, which described his symptoms. As discussed above, no verifying medical evidence indicates Liggins needed emergency medical care. Barnett did not send Liggins back to his cell without seeing a doctor, but arranged for him to see Dr. Caldwell. Barnett thus did not deny Liggins treatment. Furthermore, the inmate had the opportunity to sit while he waited. Liggins was asked to wait to see the doctor because of prison policy based on staff limitations and the need to provide a physician's attention to all sick inmates. *See Herlein v. Higgins*, 172 F.3d 1089, 1090-91 (8th Cir. 1999) (prison regulations survive constitutional challenge if they are reasonably related to legitimate penological interests); *cf. Cooper v. Schriro*, 189 F.3d 781, 784 (8th Cir. 1999) (speculative allegations cannot support retaliation claim) (internal citation omitted).

Concerning Barnett's alleged berating of Liggins for not using the sick-call procedures and for complaining about her behavior to Helling, Barnett's comment that Liggins would be the last person to see the doctor, and her smiles while Liggins was in the waiting room, the court notes that Barnett's actions did not prevent Liggins from writing a grievance against her or result in any other constitutional deprivation. An inmate's claims of verbal threats and general harassment are not, without more, actionable under section 1983. *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993); *Rustan v. Rasmussen*, No. 99-3283, 2000 WL 227987, at \*2 (8th Cir. Feb. 11, 2000) (table) (affirming grant of summary judgment on inmate's claim correctional officers harassed and verbally

threatened him in retaliation for his grievance and petition against one of the officers; stating claim that officers verbally threatened him "cannot form the basis of a cognizable section 1983 claim"); White v. Fauver, 19 F. Supp. 2d 305, 318 (D.N.J. 1998) (stating § 1983 claim accrues only when threats or threatening conduct result in constitutional deprivation).

The court finds that Liggins has not raised a genuine disputed fact sufficient to satisfy his burden on this retaliation claim.

Liggins next asserts that Barnett wrote a disciplinary report in retaliation for Liggins' complaints to her supervisors. Inmates have a constitutionally protected right to express complaints about the conduct of prison staff and conditions of confinement. *See Cooper*, 189 F.3d at 784; *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989). Liggins, however, failed to rebut Defendants' evidence that he was in fact convicted of the disciplinary violation that Barnett reported. *See Earnest v. Courtney*, 64 F.3d 365, 367 (8th Cir. 1995) (per curiam) (retaliation claim precluded if punishment was based on actual violation of prison rules); *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994) (prison disciplinary committee's finding that prisoner actually violated prison regulations "checkmate[d]" prisoner's retaliation claim).

Furthermore, Liggins did not state that the punishment he received following his disciplinary hearing was overturned or invalidated, and therefore his claim for damages and declaratory relief is barred under *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). *See Cooper*, 189 F.3d at 784.<sup>3</sup>

The court finds that Liggins has failed to set forth sufficient evidence from which a jury could infer that but for the alleged unconstitutional, retaliatory motive, discipline would not have been imposed. The court respectfully recommends that Barnett's Motion for Summary Judgment be granted on this issue.

## D. Qualified Immunity

Barnett asserts she is entitled to qualified immunity from Liggins' claims. Before a defendant may invoke this affirmative defense, a court must first determine whether the plaintiff has proved a constitutional violation by the defendant. *Hedges v. Poletis*, 177 F.3d 1071, 1074 (8th Cir. 1999);

<sup>&</sup>lt;sup>3</sup> His claim for injunctive relief, however, would survive if retaliation were shown, because such relief does not call into question the validity of the underlying punishment. *See Cooper*, 189 F.3d at 784 (citing *Edwards v. Balisok*, 520 U.S. 641, 648 (1997)).

Thomas v Hungerford, 23 F.3d 1450, 1452 (8th Cir. 1994). If a court finds there has been a constitutional violation, then it must decide whether the constitutional right was clearly established at the time of the defendant's actions. *Thomas*, 23 F.3d at 1452. As noted above, the court finds that Liggins has provided insufficient evidence to show a constitutional violation occurred. Therefore, the qualified-immunity issue is moot in relation to the claims against Barnett.

# II. Claims Against Defendants Graves and Helling

Defendants contend Liggins failed to state a claim against Warden Graves and Deputy Warden Helling under section 1983, in that he did not state specifically any actions by the two defendants that violated his constitutional rights. Liggins agrees that the claims should be dismissed, because Helmick allegedly destroyed the memoranda Liggins wrote to Graves and Helling, and therefore the two men never received the memoranda. (Pl.'s Mem. Res. at 9.)

For these reasons, the court respectfully recommends that these claims be dismissed.

# III. Claims Against Defendant Helmick

Liggins claims that, because he wrote a grievance against Nurse Barnett, Helmick retaliated against him on December 22, 1999, by verbally abusing Liggins, and on December 28 by destroying the grievances and memoranda and falsely reporting to the classification committee that Liggins would not consent to a strip search. Defendants Graves, Helling and Helmick contend that they are entitled to judgment as a matter of law on the retaliation claims, that the PLRA's exhaustion and physical-injury requirements bar Liggins' retaliation claims against Helmick, and, alternatively, that they are entitled to qualified immunity from money damages on these claims.

## A. Judgment as a Matter of Law

Defendants first argue that no genuine issue of disputed facts remains, and they are entitled to judgment as a matter of law. Specifically, they maintain the undisputed facts show that Liggins refused to be strip searched on December 28, 1999. Therefore, Helmick's reporting of the inmate's refusal to be searched was not false, and Liggins' absence from the classification review was because of prison policy, not because of his grievance against Barnett. In support of their argument, Defendants cite *Sisneros v. Nix*, 95 F.3d 749 (8th Cir. 1996) (holding no unlawful retaliation when transfer was motivated by rational penological concerns – determination that inmate's needs could be more cost effectively accommodated in Arizona prison – and not by fact inmate had filed two

lawsuits); *Hazen v. Reagen*, 16 F.3d 921 (8th Cir. 1994) (holding First Amendment did not bar transfer; officials transferred inmate because of reasonable belief he was troublesome and manipulative, not because he complained and sought redress of grievances); and *Goff v. Burton*, 7 F.3d 734 (8th Cir. 1993) ("[I]f the discipline which the prisoner claims to have been retaliatory was in fact imposed for an actual violation of prisoner rules or regulations, then the prisoner's claim that the discipline was retaliatory in nature must fail.").

Defendants' statement of the law is correct. The problem for Defendants is that Liggins disputes that he refused to be searched on December 28. Liggins claims he was searched, but that Helmick falsely reported his refusal. The parties also dispute whether Helmick verbally abused Liggins on December 22, and whether the officer tore up Liggins' grievances and memoranda on December 28.

The court finds that genuine issues of material fact remain in dispute, and respectfully recommends that Defendants' Motion for Summary Judgment be denied on this issue.

# B. Physical-Injury Requirement

Defendants next assert that the PLRA's physical-injury requirement, found in 42 U.S.C. § 1997e(e), bars Liggins' retaliation claim against Helmick.

Section 1997e(e) states in pertinent part as follows: "No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). Defendants maintain that Liggins suffered no physical injury in connection with Helmick's alleged retaliatory acts, and therefore his claim must be dismissed.

Liggins maintains the physical-injury bar does not apply to his claim because he suffered injury when he fainted and hit his head on December 20, 1999. The applicable dates in the claim against Helmick, however, are December 22 and 28. Liggins offers no evidence of physical injury in connection with Helmick's acts on either December 22 or 28. The inmate's fainting on December 20 is relevant only to his claims against Barnett.

Liggins next argues that the physical-injury requirement does not require dismissal of his retaliation claim, but instead limits the type of damages that apply. The Eighth Circuit has not yet addressed this issue. *See Kellensworth v. Norris*, No. 98-3887, 2000 WL 764845, at \*1 (8th Cir.

June 14, 2000) (per curiam) (holding, when plaintiff suffered no actual physical injury, that damages were barred under § 1997e(e), but declining to decide whether statute also barred claim for injunctive relief). Courts disagree over the scope of section 1997e(e). *See Mason v. Schriro*, 45 F. Supp. 2d 709, 715 (W.D. Mo. 1999) (collecting cases).

In support of his argument, Liggins cites Royal v. Brandt, 4-98-CV-30495, Ruling on Def.'s Mot. Summ. J. (S.D. Iowa Oct. 11, 2000), appeal docketed, No. 00-3726 (8th Cir. Nov. 16, 2000). In Royal, the court held that the PLRA's physical-injury requirement barred the plaintiff from recovering damages for mental or emotional injury, but not from bringing a claim alleging retaliation for exercising his right of access to the courts. *Id.* at 9. The court held the plaintiff was not barred from seeking other damages, including nominal and punitive damages, for the violation of his constitutional rights implicated in his retaliation claim. *Id.*; see Allah v. Al-Hafeez, 226 F.3d 247, 250-51 (3d Cir. 2000) (same); Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999) (stating § 1997e(e)'s physical-injury requirement applies only to claims for mental or emotional injury; an inmate is entitled to judicial relief for violation of First Amendment rights aside from any physical, mental, or emotional injury); Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (stating § 1997e(e) does not prevent actions for injunctions and declaratory judgments, and that violation of certain absolute constitutional rights will support claim for nominal damages without showing actual injury); Craig v. Cohn, 80 F. Supp. 2d 944, 947 (N.D. Ind. 2000) (stating that although § 1997e(e) limits prisoner's ability to recover for mental and emotional distress, he may still seek injunctive relief or other forms of damages for a constitutional violation); Marrie v. Nickels, 70 F. Supp. 2d 1252, 1264 (D. Kan. 1999) (holding § 1997e(e) barred plaintiff's claim for emotional distress damages, but not for nominal and punitive damages, when plaintiff did not allege he suffered physical injury as result of defendants' retaliation) (citing *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803 (10th Cir. 1999)). Here, Liggins seeks relief other than recovery for mental and emotional distress.

The court finds persuasive the reasoning in the above cases. The court respectfully recommends that Liggins' retaliation claim against Helmick not be dismissed on the basis that it is barred by section 1997e(e)'s physical-injury requirement, although any claim for damages for mental and emotional distress should be denied.

# C. Exhaustion Requirement

Defendants contend that Liggins failed to exhaust his administrative remedies concerning Helmick's actions by using the grievance system or by using the prison's procedure for appealing the segregation review committee's December 28, 1999, decision to place him in A9.

The PLRA, states 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). The statute defines "civil action with respect to prison conditions" as meaning "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 42 U.S.C. § 3626(g)(2).

## 1. Prison Conditions

Liggins argues that section 1997e(a)'s exhaustion requirement does not bar his retaliation claim, because retaliatory actions are not prison conditions as defined under the statute.

Courts are divided over whether retaliation claims fall outside the scope of the term "prison conditions," and thus outside the purview of the PLRA's exhaustion requirement. *Compare White*, 19 F. Supp. 2d at 317-18 (holding that under § 1997e(a), term "prison conditions" applied not only to allegedly poor prison conditions, but also to false disciplinary charges and retaliation for filing suit) (citing *Brown v. Tooms*, 139 F.3d 1102, 1104 (6th Cir. 1998)) with Lawrence v. Goord, 238 F.3d 182, 185-86 (2d Cir. 2001) (holding term "prison conditions" did not include particularized instances of retaliatory conduct directed against inmate). The Eighth Circuit has not addressed the question. Similarly, courts are split over whether section 1997e(a)'s phrase "prison conditions" encompasses excessive-force claims, requiring exhaustion. *See Johnson v. Garraghty*, 57 F. Supp. 2d 321, 325-27 (E.D. Va. 1999) (collecting and analyzing cases). "Because 'prison conditions' must be given the same meaning throughout the PLRA," the *Johnson* court stated, "it follows that Congress is appropriately assumed to have intended the definition of 'civil action with respect to prison conditions' used in § 3636(g)(2) to apply equally to the phrase 'action . . . with respect to prison conditions' in § 1997e(a)." *Id.* at 327. Civil actions by inmates raising excessive-force claims satisfy

section 3636(g)(2)'s definition of "civil action[s] with respect to prison conditions," in that such claims encompass the effects of officials' acts on an inmate's life. *Id.* Therefore, because excessive-force claims fall within section 3636(g)(2)'s use of "prison conditions," the claims also fall within the scope of "prison conditions" under section 1997e(a). *Id.* (citing several cases where courts have similarly reasoned).

The Eighth Circuit has characterized section 3636(g)(2)'s definition as one that "cuts broadly." *Castano v. Nebraska Dep't of Corr.*, 201 F.3d 1023, 1024 (8th Cir. 2000) (stating PLRA's language does not suggest Congress intended deliberately chosen statutory language to have some special, limited meaning), *cert. denied*, 121 S. Ct. 266 (2000). "We believe 'prison conditions' must be given the same meaning throughout the PLRA." *Id*.

Keeping in mind the Eighth Circuit's broad view of "prison conditions" under the PLRA, and the Circuit's view that the term must be given the same meaning throughout the PLRA, the court finds persuasive the reasoning of those courts that have held that section 1997e(a)'s exhaustion requirement encompasses retaliatory conduct, and also finds persuasive, by analogy, the *Johnson* court's reasoning concerning excessive-force claims. The court finds the exhaustion requirement applies to Liggins' claims, unless he can establish that his claims fall within an exception to the requirement.

## 2. Available Administrative Remedies

Liggins maintains that the exhaustion requirement should not bar his claims because exhaustion was unavailable to him, in that Helmick destroyed Liggins' grievances on December 28, 1999.

A "remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a)." *Miller v. Norris*, No. 00-1053, 2001 WL 360644, at \*3 (8th Cir. April 12, 2001) (holding inmate's allegations raised inference that he was prevented from using prison's administrative remedies, when prison employees failed to provide inmate with grievance forms; citing with approval case stating administrative remedy was inadequate where officials ignored or interfered with prisoner's attempts to exhaust remedies). An inmate's subjective beliefs, however, "logical or otherwise, about the administrative remedies that might be available to him" are irrelevant for purposes of determining whether the inmate satisfied § 1997e(a)'s exhaustion requirement. *See* 

Chelette v. Harris, 229 F.3d 684, 688 (8th Cir. 2000), cert. denied, 121 S. Ct. 1106 (2001). The Eighth Circuit recently declined to determine whether prison authorities' threats to retaliate if an inmate filed grievances would make administrative remedies unavailable. Ealey v. Schriro, No. 99-2371, 2000 WL 235048, at \*1 (8th Cir.) (table) (per curiam) (refusing to "wrestle with that issue, which is not without difficulty," and turning directly to merits, which had either been adequately addressed by prison officials or were trivial; ordering dismissal of all claims with prejudice), cert. denied, 121 S. Ct. 239 (2000).

It is unclear whether Liggins addresses his argument to Helmick's acts on December 22 – the subject of one grievance that Liggins destroyed on December 28 – or to the officer's acts on December 28, which included destruction of the grievance and falsely reporting to the classification committee that Liggins refused to be searched, or to Helmick's actions on both dates. The analysis differs depending on the circumstances. Accordingly, the court will analyze the argument separately in relation to acts before and after the grievance was destroyed on December 28.

## a. Verbal Threats on December 22, 1999

One grievance Helmick allegedly destroyed on December 28 concerned Helmick's alleged threatening statements on December 22. An inmate satisfies section 1997e(a)'s exhaustion requirement by exhausting available remedies within the correctional facility. *See Williams v. Norris*, 176 F.3d 1089, 1089 (8th Cir. 1999) (per curiam) (reversing district court's order dismissing § 1983 action for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a), when warden and assistant director had denied inmate's grievance at time court ruled); *cf. Burton v. Norris*, No. 99-1726, 1999 WL 617448, at \*1 (8th Cir. Aug. 13, 1999) (per curiam) (table) (affirming dismissal of inmate's action for failure to exhaust administrative remedies, when inmate started, but failed to exhaust available remedies within the prison).

Assuming, for purposes of analyzing the present Motion, that Liggins grieved Helmick's December 22 statements and that Helmick destroyed the grievance on December 28, the inmate arguably substantially complied with the exhaustion requirement, in that he exhausted, "such administrative remedies as w[ere] available." *Miller*, No. 00-1053, 2001 WL 360644, at \*3 (holding that prison officials' failure to provide grievance form raised inference that plaintiff exhausted

administrative remedies).4

## b. Acts on December 28, 1999

Defendants contend that following Helmick's alleged acts on December 28, 1999, Liggins could have filed a grievance and appealed the review committee's December 28 decision. Although the question is close, the court finds Liggins' statements that Helmick had the grievances the inmate filed on December 20 and December 22, 1999, that Liggins never received a response to these grievances, and that on December 28, Helmick destroyed the inmate's two grievances in front of the inmate and gave the review committee a false report, raises an inference that filing a grievance within the prison was an inadequate or unavailable administrative remedy for Liggins. Prison policy also gave Liggins the option of filing a grievance directly to the IDOC's central office for a complaint alleging retaliation for filing a grievance. Concerning this option, and the remedy of appealing the review committee's decision, the court finds the evidence raises an inference that Helmick's retaliatory acts – more than mere threats – made administrative remedies unavailable to Liggins in relation to Helmick's acts on December 28. Section 1997e(a)'s exhaustion therefore does not bar this retaliation claim.

Because of the court's findings, it need not address Liggins' remaining argument concerning exceptions to the exhaustion requirement.

<sup>&</sup>lt;sup>4</sup> Helmick did not threaten to retaliate if Liggins wrote more grievances, or if he did not withdraw his grievance against Barnett. Following the December 22 encounter with Helmick, Liggins wrote a grievance against the officer. A retaliation claim based solely on Helmick's statements on December 22 would arguably fail to state a claim under section 1983. Compare McDowell, 990 F.3d at 434 (holding inmate did not allege violation of constitutional rights based on allegations that prison staff harassed him generally and harassed him to dissuade him from filing grievance); Martin v. Sargent, 780 F.2d 1334, 1339 (8th Cir. 1985) (holding inmate failed to state a claim against administrative review officer, when inmate alleged officer verbally abused and threatened him for filing grievances, and inmate did not allege he was deprived of access to grievance procedures, "[v]erbal threats do not constitute a constitutional violation"); Rustan, No. 99-3283, 2000 WL 227987, at \*2 (holding summary judgment was warranted on inmate's claim that corrections officers harassed and threatened him in retaliation for grievance and petition; such claim could not form basis of cognizable claim under § 1983), with Burgess v. Moore, 39 F.3d 216, 218 (8th Cir. 1994) (holding inmate had shown sufficient injury to state retaliation claim, when he asserted officers threatened him with retaliation if he did not drop an internal prison grievance); Sanders v. St. Louis Co., 724 F.2d 665, 666 (8th Cir. 1983).

The court respectfully recommends the court deny Defendants' Motion for Summary Judgment on these claims on the basis that Liggins failed to exhaust his available administrative remedies.<sup>5</sup>

# **D.** Qualified Immunity

Qualified immunity protects government officials from suit when their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sexton v. Martin*, 210 F.3d 905, 909 (8th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In deciding whether an official is entitled to qualified immunity, the Eighth Circuit uses a two-part inquiry: "whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, whether that right was clearly established at the time of the alleged violation." *Tlamka*, 244 F.3d at 632 (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999)); *see also Sexton*, 210 F.3d at 909. At the summary judgment stage, a court determining qualified immunity must consider true those facts asserted by plaintiff and properly supported in the record. *Tlamka*, 244 F.3d at 632 (citing *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996)). A court cannot grant summary judgment on the qualified immunity issue, if a genuine dispute exists concerning predicate facts material to qualified immunity. *Id.* When a defendant asserts qualified immunity, the plaintiff has the burden to show that a question of fact precludes summary judgment. *Yellow Horse v. Pennington County*, 225 F.3d 923, 927 (8th Cir. 2000). Once predicate facts are established, the reasonableness of the official's conduct under the circumstances is a question of law. *Tlamka*, 244 F.3d at 632.

The court first determines whether Liggins has alleged the deprivation of an actual constitutional right. Defendants assert there was no violation of a constitutional right, because "at all times Liggins received proper treatment" at ISP. (Defs. Helmick, Graves, and Helling's Mem. Support Mot. Summ. J. at 19).

Liggins' complaint against Helmick alleges retaliation for the inmate's grievances. The First Amendment right of access to the courts includes the right to file grievances under existing prison

<sup>&</sup>lt;sup>5</sup> Liggins' pro se complaint does not divide his claim into counts. As explained above, the court has analyzed Liggins' exhaustion argument according to Helmick's actions before and after destruction of the grievance relating to the officer's December 22 statements. To the extent Liggins' claim is intended to include Helmick's acts on both December 22 and 28 in one count, the claim is exhausted for reasons explained in this subsection.

grievance procedures. *Dixon v. Brown*, 38 F.3d 379, 379 (8th Cir. 1994). Prison officials may not retaliate against an inmate for filing a prison grievance. *Dixon v. Brown*, 38 F.3d 379, 379 (8th Cir. 1994); *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990); *Sisneros v. Nix*, 884 F. Supp. 1313, 1333 (S.D. Iowa 1995), *rev'd on other grounds*, 95 F.3d 749 (8th Cir. 1996). As the court found above, Liggins has established genuine issues of material fact, including whether Helmick destroyed Liggins' grievances and memoranda on December 28, and whether Helmick falsely reported that Liggins refused to be searched on December 28. Viewing the evidence, and the inferences that flow from that evidence, in the light most favorable to Liggins, the court finds that the inmate's complaint and untested evidence support a valid claim against Helmick for violation of constitutional rights.

The court next addresses whether the claim implicates clearly established law. To be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Buckley v. Rogerson*, 133 F.3d 1125, 1128 (8th Cir.1998) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The court has not found any decisions involving facts similar to those in the present case, but that is not dispositive. *See Tlamka*, 244 F.3d at 634. The Eighth Circuit takes a "broad view" of what constitutes clearly established law: In the "absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits and district courts." *Id.* (quoting *Buckley*, 133 F.3d at 1129).

At the time of the actions at issue, the law was settled in this circuit that retaliating against an inmate for filing grievances could give rise to a First Amendment violation. *See Dixon*, 38 F.3d at 379; *Orebaugh*, 910 F.2d at 528; *Sisneros*, 884 F. Supp. at 1333.

The court finds that under the facts on the summary judgment record, any reasonable officer would have known that Helmick's actions would have risen to a First Amendment violation. The court respectfully recommends that summary judgment be denied on this claim for qualified immunity.

#### RECOMMENDATION

#### Defendant Barnett

The court finds that Liggins has failed to provide sufficient evidence from which a jury could infer that Defendant Barnett violated the Eighth Amendment by acting in deliberate indifference to his serious medical needs and retaliating against him.

IT IS RESPECTFULLY RECOMMENDED, pursuant to 28 U.S.C. § 636(b)(1)(B), that

Barnett's Motion for Summary Judgment (Clerk's No. 25) be **granted**, and judgment entered in favor of Defendant Barnett.

## Defendants Graves and Helling

Defendants Graves and Helling assert, and Liggins agrees, that Liggins has failed to state a claim against them.

IT IS RESPECTFULLY RECOMMENDED that Defendants' Motion for Summary Judgment (Clerk's No. 31) be **granted** with respect to Liggins' claims against Defendants Graves and Helling, and judgment entered in favor of Defendants Graves and Helling.

### Defendant Helmick

The court finds Liggins has established genuine issues of material fact precluding summary judgment with respect to his retaliation claim against Helmick. The court further finds that any reasonable officer would have known that Helmick's actions would have risen to a First Amendment violation under clearly established law, and thus that qualified immunity does not apply.

IT IS RESPECTFULLY RECOMMENDED that, with respect to this claim, Defendants' Motion for Summary Judgment (Clerk's No. 31) be **denied**, including the request for qualified immunity.

## Defendants Lawson, Barlow, Pederson and Tripp

Plaintiff filed a Motion to Dismiss (Clerk's No. 49) the claims he filed April 2, 2000, in his Amended Complaint against Defendants Lawson, Barlow, Pederson and Tripp. Defendants have not resisted the Motion.

IT IS RESPECTFULLY RECOMMENDED that Plaintiff's Motion to Dismiss (Clerk's No. 49) be **granted** with respect to Liggins' claims against Defendants Lawson, Barlow, Pederson and Tripp, and judgment be entered in Defendants' favor.

### **ORDER**

IT IS ORDERED that the parties have until May 30, 2001, to file written objections to this Report and Recommendation, under 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990). Such extensions will be freely granted. Any objections filed must identify the specific portions of the Report and Recommendation

and relevant portions of the record to which the objections are made and set forth the basis for such objections. *See* Fed. R. Civ. P. 72; *Thompson*, 897 F.2d at 357. Failure to timely file objections may constitute a waiver of a party's right to appeal questions of fact. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Thompson*, 897 F.2d at 357.

The Evidentiary Hearing will be set, if necessary, after the District Court rules on this Report and Recommendation and any objections.

IT IS SO ORDERED.

Dated this \_\_\_\_day of May, 2001.

CELESTE F. BREMER UNITED STATES MAGISTRATE JUDGE