NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 21, 2017*
Decided December 21, 2017

Before

DIANE P. WOOD, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 16-3664

HECTOR R. DeJESUS,
Plaintiff-Appellant,

v.

SALVADOR A. GODINEZ, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 1:14-cv-01260

Sara L. Darrow,
Judge.

ORDER

Hector DeJesus, an Illinois prisoner at Hill Correctional Center, brought this lawsuit under 42 U.S.C. § 1983 after he was beaten by his cellmate. He asserted that Hill's cell-placement policy and its failure to provide adequate nutrition caused the attack and demonstrated the prison officials' deliberate indifference to a serious risk of harm. He further claimed that Wexford Health Sources, Inc. and its staff, who provide medical services at Hill, had a cost-cutting policy that caused them to be deliberately

* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

indifferent to his injuries. Ultimately, Judge Darrow entered summary judgment for the defendants, and DeJesus appeals. We affirm the judgment.

We recite the facts in the light most favorable to DeJesus, the non-movant. *Proctor v. Sood*, 863 F.3d 563, 564 (7th Cir. 2017). Beginning in May 2012, prison officials started a pilot program to serve two meals per day—brunch and dinner—instead of three. The menu was adjusted so that each inmate received the same number of calories, eight ounces of protein (up from six), and at least five fruit or vegetable options a day (a new requirement). The IDOC's dietician attested that two meals a day instead of three was adequate nutrition for an otherwise healthy person. But DeJesus testified that in practice, starting in 2009, portion sizes were continually reduced, and several items on the menus never made it to the prisoners or were inedible. At times the meal trays were nearly empty, and DeJesus once heard the kitchen manager admonishing the staff to give out "little bits." As a result, DeJesus says, many inmates who could not afford commissary items were starving. This included his cellmate, who attacked him for his commissary money.

As for cell placements, at IDOC intake, all inmates are initially screened to determine whether they can have a cellmate. Then, upon arriving at Hill, each inmate is interviewed by staff to learn more specific information about him. Afterwards, the Placement Office assigns cells, which requires an official to assess whether two inmates will get along. They consider, among other things, each inmate's age, size, gang affiliation, release date, and history of violence as well as possible racial tension. An inmate can raise housing concerns at any time but is moved only if an investigation reveals a problem.

DeJesus is Puerto Rican, and in July 2012, was 61 years old and not gang-affiliated. His cellmate at the time, Jamie Evans, was African American, 20 years younger, bigger in size and physically stronger than DeJesus, and not recorded as gang-affiliated. They had not been flagged as incompatible. On July 8, while DeJesus was sitting on the toilet, Evans unexpectedly attacked, punching, kicking, and choking him. The beating ended only when DeJesus agreed to give Evans his commissary money. A passing guard took DeJesus to the prison's medical clinic.

At the clinic, DeJesus first showered on his own, and then was examined by two nurses, defendants Sarah Faetanini and Lorna Stokes. The nurses recorded that he suffered a "superficial laceration" on his forehead and abrasions on his body. The injury report states that DeJesus had no trouble talking, sitting, or walking, nor did he have

shortness of breath or bruising. DeJesus says he was in worse shape—he could barely talk or breathe and had bruises all over his body. The nurses did not refer him to see the doctor; instead they cleaned his wounds and gave him ibuprofen before he was taken to investigative segregation. A week later, Stokes and a different nurse saw DeJesus at sick call because he was complaining of back pain. They did not report any swelling, bruising, or difficulty with walking, standing, or sitting. Once again they gave him pain medication and did not refer him to a doctor. DeJesus testified that Stokes accused him of "bullshitting" the nurses about having broken bones, explaining he just had sore muscles that needed exercise instead.

On July 25, after reviewing the earlier treatment notes, Dr. Kul Sood examined DeJesus, finding no tenderness or bruising on his back and normal range of motion and vitals. DeJesus asked Dr. Sood to take x-rays, but Dr. Sood refused, saying x-rays caused cancer. Instead, Dr. Sood prescribed Naprosyn, an anti-inflammatory, for DeJesus's pain and ordered a follow-up appointment for August 1. On that day too, his exam was unremarkable, although DeJesus still complained of a little tenderness in his back. Dr. Sood extended his Naprosyn prescription by five days.

After that, DeJesus's complaints related to the assault became sporadic. In late August he complained that his back and rib cage had been hurting since the attack. He had no visible signs of discomfort, but a nurse gave him ibuprofen for the pain. This repeated in May and August 2013; medical staff observed no objective signs of discomfort but gave him pain medication anyway. In March 2014, a nurse gave him ibuprofen and ordered x-rays of his thoracic and lumbar spine and his chest. The x-ray results revealed that DeJesus had a pectus excavatum deformity in his thoracic wall, which is a congenital defect, and that his spine had spurring and slight scoliosis, which an outside radiologist said were both degenerative changes. DeJesus, on the other hand, believes that the attack injured his back, causing his continuing pain.

Two weeks before Evans attacked, DeJesus had sent a transfer request to defendant Shawn Gibbs, one of the correctional officers who assigned cellmates; DeJesus said that Evans was "too loud" and "aggressive from day one." He received no response. Gibbs attested that he never got any letter from DeJesus about any "problem with his cell." DeJesus admits that Evans had never threatened him and that he had no reason to believe that Evans would physically attack him.

DeJesus filed suit in June 2014. In his amended complaint, DeJesus alleges that the prison had a policy of intentionally celling vulnerable inmates with "dangerous

predators" while also reducing the food served to starve the "predators" into being violent. According to DeJesus, these policies led directly to Evans's attack in July 2012 in order to take his commissary money. DeJesus further alleges that Wexford had a policy of providing inadequate treatment to save money. This policy, he alleges, caused the medical staff to ignore his requests for an x-ray and instead just give him medicine, which was ineffective.

During discovery DeJesus filed several motions to compel, asking Judge Darrow to order the defendants to turn over, among other things, records of all violent activity at the prison (or at least data summarizing this activity) and two of his cellmates' (including Evans's) rap sheets. The defendants objected on many grounds, including that these requests were overly burdensome because they spanned years and the defendants had only monthly reports; they covered information in confidential files; and their disclosure would create "safety and security" risks. The judge agreed with the defendants that they could not produce nonexistent information (such as the summaries DeJesus wanted) and that some of the documents would involve security risks, so she denied DeJesus's motion.

Throughout the litigation, DeJesus was keen on getting testimony from a medical expert. He moved for the recruitment of counsel in part because he thought counsel could obtain an expert witness to review his x-rays. (The court never specifically addressed that issue in denying the motion but concluded generally that DeJesus could competently litigate his claims.) He also separately requested twice that the court appoint an independent expert to examine the x-rays. Although the medical staff believed that the x-rays showed degenerative changes and a congenital defect, he thought that the abnormalities were caused by his cellmate's assault. Judge Darrow denied his first request on the grounds that DeJesus did not need an expert and that DeJesus appeared to want his own, partial expert witness, not the independent expert Rule 706 contemplates. The judge denied the second motion as moot upon entering summary judgment for the defendants.

Judge Darrow granted the motions for summary judgment of the state (IDOC) defendants and the medical (Wexford) defendants on all claims. The judge understood DeJesus's claims to be that (1) the Wexford defendants were deliberately indifferent to the serious injuries his cellmate inflicted; (2) the prison's brunch system was an unconstitutional condition of confinement; and (3) Hill's alleged cell-placement policy was unconstitutional. She also posited that DeJesus intended to raise a failure-to-protect theory of relief. After granting judgment for certain individual defendants for lack of

personal involvement and Wexford for DeJesus's failure to establish that there was a policy in play (the only way to hold Wexford liable), the judge concluded that DeJesus had not offered enough evidence to raise a genuine issue of material fact about any remaining defendant's culpability.

On appeal, DeJesus first argues that the district judge wrongly construed his contentions about inadequate food as a freestanding claim. Instead, he says, he challenged that policy only as part of his claim that prison officials created a substantial risk of harm to older, weaker inmates by placing them in cells with starving "predators." We take DeJesus at his word and do not consider whether the brunch system provided inadequate nutrition in violation of the Eighth Amendment.

As for DeJesus's interrelated contentions that two of Hill's supposed policies—intentionally pairing stronger cellmates with weaker ones and starving them to spark conflict—violate the Eighth Amendment, they are unfounded. He says that Hill staff celled him with "large, younger predators" who were part of gangs and used "food rations which stimulated them into robbing and threatening" him. The IDOC defendants' motivation in having these policies, he contends, is to use the "predators" as "a form of [ ] discipline," making inmates "co-operate" with prison staff, and to increase commissary profits, which "pay for the fat pay checks of the commissary and kitchen staff" and help "feed the [IDOC] staff lavish meals in separate kitchens." And DeJesus thinks that they targeted him specifically, using dangerous cellmates to punish him because he left a job in the kitchen to attend school instead. Once their plan worked, they then "conspired with the medical staff" "to conceal evidence" of his injuries.

At the summary-judgment stage, DeJesus had an evidentiary burden to meet, and he fell short. The IDOC defendants set forth evidence showing that prison policy was to house compatible inmates together, and that the policy required them to consider many different factors, including size differences and gang affiliation. Affidavits from the correctional officers who assigned cells stated that they followed this policy in DeJesus's case. DeJesus has no contrary evidence; he simply infers from his experiences, and those of a few other inmates, that at Hill there was an official policy of housing older, weaker inmates with younger, stronger, gang-affiliated ones. But his suspicions, even when expressed under oath, are not evidence that creates a genuine issue of material fact. *See Aguilar v. Gaston-Camara*, 861 F.3d 626, 630–31 (7th Cir. 2017).

The same is true of DeJesus's claim that prison officials had a policy of starving inmates to cause them to prey on weaker cellmates so that the officials both had job security and gained commissary profits to fund their paychecks and staff kitchen. DeJesus could testify about what he personally experienced, but his belief that his experiences stemmed from official prison policy, again, are pure speculation. *See Consolino v. Towne*, 872 F.3d 825, 830 (7th Cir. 2017); *McGee v. Adams*, 721 F.3d 474, 483–84 (7th Cir. 2013). Not only that, his theories simply do not make sense.

Aside from the claims about Hill's unlawful policies, DeJesus also, at times, seems to argue that defendant Gibbs (who was responsible for cell placement) or others knew about, yet failed to protect him from, "a substantial risk of serious harm" from Evans. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994). For example, he emphasizes that he had reported that Evans was "aggressive" before he was attacked. Gibbs, for his part, denies ever receiving DeJesus's request to be moved. Assuming that DeJesus's version is true, however, his transfer request referring to Evans as "aggressive" falls short of being a report of "a specific, credible, and imminent risk of serious harm" that would sufficiently put Gibbs on notice, especially since DeJesus admits that even he had no idea Evans would attack. *See Gevas v. McLaughlin*, 798 F.3d 475, 481 (7th Cir. 2015).

Regarding the Wexford defendants, DeJesus maintains that they were not entitled to summary judgment on his claim that they ignored or undertreated his injuries from the attack. He points to certain parts of his testimony that the judge did not recount, such as his own description of his injuries, Stokes's comment that he was lying about having broken bones, and Dr. Sood's statement that x-rays cause cancer. Assuming first that his condition was objectively serious (which the defendants contest), none of these statements, alone or in combination, would allow a reasonable jury to conclude that the medical staff's behavior fell so outside the applicable standard of care that they were not basing treatment on their medical judgment. *See Proctor*, 863 F.3d at 568; *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014). The record reflects "active treatment" by the medical staff, including multiple examinations, dispensing of medication, and eventually, a diagnostic x-ray. *See Cesal v. Moats*, 851 F.3d 714, 723 (7th Cir. 2017). This kind of "meaningful and ongoing assessment of a patient's condition is the antithesis of 'deliberate indifference.'" *McGee*, 721 F.3d at 482.

Plainly, DeJesus disagrees with Dr. Sood's decision not to order x-rays shortly after the attack, but his dissatisfaction with that choice does not, without more, establish that Dr. Sood was deliberately indifferent. *See Pyles*, 771 F.3d at 409; *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006). Moreover, "the question whether an X-ray or

additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment." *Estelle v. Gamble*, 429 U.S. 97, 107 (1976). And although DeJesus believes that the attack caused his back problems, he is not competent to deliver this opinion and has no medical evidence to support it.

To that end, DeJesus argues that the district judge abused her discretion in denying his motions for a court-appointed expert who would examine the x-rays of his back and spine. *See* FED. R. EVID. 706(a). But Rule 706 is used to appoint a neutral expert to interpret complex information for the trier of fact, not to represent the interests of one party, as DeJesus appears to think. *See Kennedy v. Huibregtse*, 831 F.3d 441, 443 (7th Cir. 2016). The district judge reasonably concluded here that an expert would not have been helpful. *See* FED. R. EVID. 702; *Gil v. Reed*, 381 F.3d 649, 659 (7th Cir. 2004). And even if an appointed expert had disagreed about what the x-ray showed with respect to the cause of DeJesus's pain, disagreement among doctors, without evidence that one is not exercising medical judgment, is not evidence of deliberate indifference. *See Pyles*, 771 F.3d at 409.

Finally, we will not disturb the district court's discovery rulings. DeJesus contends that records of other violent incidents at the prison and his cellmates' rap sheets were not confidential and would help establish that the prison polices caused pervasive violence. But a record of prison violence would say nothing of its cause, so having the data would not assist DeJesus in proving that the supposed policies existed. Further, the judge accepted the defendants' objection that giving DeJesus information about other inmates would cause privacy concerns and security risks. This was not an abuse of her considerable discretion over discovery matters. *See Jones v. City of Elkhart, Ind.*, 737 F.3d 1107, 1115–16 (7th Cir. 2013).

We have reviewed DeJesus's remaining contentions, including those regarding Wexford's purported cost-cutting policy and individual defendants' personal involvement, and none has merit. Accordingly, we AFFIRM the judgment.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

HECTOR DEJESUS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 14-1260-SLD**
	)	
	)	
PAT QUINN, *et al.*,	)	
	)	
Defendants.	)	

ORDER

This cause is before the Court on Defendants' motions for summary judgment. As explained more fully *infra*, Defendants are entitled to the summary judgment that they seek. Defendants have shown that they are entitled to judgment as a matter of law on each of Plaintiff Hector DeJesus' claims, and DeJesus has failed to offer any admissible evidence with which to create a genuine issue of material fact sufficient to preclude summary judgment in Defendant's favor.

I.
MATERIAL FACTS

Plaintiff Hector DeJesus is an inmate within the Illinois Department of Corrections ("IDOC"). During the relevant time, DeJesus was housed at the Hill Correctional Center. From April 6, 2011, until July 8, 2012, DeJesus was housed in the R1 Cell House, cell C-32, which is in the general population at Hill. On July 8, 2012, DeJesus' cellmate, Jamie Evans, attacked him. DeJesus claims that Evans attacked him, at least in part, as a result of the IDOC and Hill's unconstitutional policy of mismatching inmates as cellmates. DeJesus claims that IDOC and Hill maintain a policy of placing younger, stronger inmates as cellmates with older, weaker inmates in order to help maintain control in the institution.

According to DeJesus, Evans attacked him while he was defecating. Before Nurse Faetanini conducted an examination on DeJesus for the injuries that he sustained from Evans' attack, DeJesus took a shower unassisted because he had fecal matter on him. DeJesus presented to Nurse Faetanini with a superficial laceration to his head and mild abrasions to his shoulder and deltoid. Although DeJesus claimed that he had been kicked in the throat, Nurse Faetanini observed was no bruising, redness, or swelling in DeJesus' throat, and he was speaking without difficulty throughout the examination. DeJesus had no shortness of breath, and he denied losing consciousness. Because there was no apparent distress to DeJesus (he was alert, his neurological functions were intact, and his blood pressure was normal which indicates he was not in distress), Nurse Faetanini cleansed and sterilized DeJesus' open wounds, applied steristrips, and provided him with Advil for any pain he was experiencing. Nurse Faetanini did not, however, refer DeJesus to see the doctor because, based on her examination, DeJesus did not suffer any serious injuries.

On July 16, 2012, Nurse Lorna Stokes examined DeJesus based upon his complaints of back pain. DeJesus did not present with swelling, redness, bruising, tenderness to touch, or limitation of movement. Nurse Stokes further noted that DeJesus walked, sat, and stood without difficulty. Accordingly, nothing in Nurse Stokes' evaluation indicated to her that he had a serious medical need. Nurse Stokes gave DeJesus Ibuprofen to help with the self-reported pain, but she did not refer him to the doctor because she did not believe it was necessary based on her examination of DeJesus.

On July 25, 2012, Dr. Sood examined DeJesus concerning the injuries that he had sustained on July 8, 2012, as a result of Evans' attack. Prior to the July 25, 2013 examination of DeJesus, Dr. Sood reviewed DeJesus' July 8, 2012 Offender Injury Report completed by Nurse

Faetanini and the progress notes from July 16, 2012. During the July 25, 2012 visit, DeJesus stated that he was feeling better. Upon his examination, Dr. Sood determined that DeJesus did not present any issues that indicated that he suffered a serious injury as a result of the July 8, 2012 assault. As part of the examination, Dr. Sood checked DeJesus' vitals, tested his mobility, and physically examined him in order to rule out potential fractures, internal organ trauma, and other potential conditions resulting from a physical altercation. DeJesus' vitals were normal; he had normal range of motion in his back; and there was no bruising or swelling, and no crepitus.

Based on the examination, Dr. Sood determined that DeJesus did not sustain any fractures, internal organ damage, neurological damage, or any other medical issues as a result of the July 8, 2012 altercation. Due to DeJesus' complaints of tenderness, Dr. Sood prescribed DeJesus Naprosyn 500mg, a nonsteroidal anti-inflammatory medicine, twice a day for seven days for any pain that DeJesus experienced. Dr. Sood did not order an X-ray because he determined that one was not necessary.

On August 1, 2012, Dr. Sood had a follow up appointment with DeJesus regarding his back. During the August 1, 2012 examination, DeJesus stated his back was better. DeJesus' August 1, 2012 examination was unremarkable. DeJesus' vitals were normal, and DeJesus did not present with any bruising or swelling. DeJesus only complained of slight tenderness in his back. Because DeJesus complained of continued tenderness in his back, Dr. Sood extended his Naprosyn prescription by 5 days. Dr. Sood, again, determined that an X-ray was not necessary based on his assessment of DeJesus' condition.

DeJesus was seen during nurse sick call on August 23, 2012, where he stated that he was still sore from the July 8, 2012 altercation. Specifically, DeJesus complained of left lateral rib cage pain. However, the nurse noted no swelling, no weakness/numbness, no tenderness, normal

range of motion, and no signs of discomfort. DeJesus was provided Advil for his complaints of pain. The nurse did not refer Plaintiff to see Dr. Sood.

On August 14, 2013, DeJesus complained of back pain that radiated down to his legs. DeJesus described the pain as aching. The nurse noted there was no apparent distress, there were no deformities, and observed DeJesus have full range of motion of right knee. DeJesus was able to bend at the waist and side to side without difficulty, had no tenderness, and had no difficulty with urination. DeJesus was provided with acetaminophen, strengthening exercises, and directed to return to nurse sick call if symptoms worsen.

DeJesus received an X-ray on May 1, 2014, of his Thoracic and Lumbar Spine. The X-ray results demonstrated that DeJesus had degenerative changes of the spine and no fractures or acute bony abnormalities. The conditions identified in DeJesus' X-ray results are consistent with arthritic conditions in the spine and not the result of trauma stemming from the July 8, 2012 altercation. DeJesus' pectus excavatum deformity identified in his March 4, 2014 radiology report is a congenital deformity and, therefore, was not caused by the July 8, 2012 altercation.

Finally, as for his third claim, DeJesus states that from May 2012 until he filed his Complaint, he received insufficient and inadequate meals at Hill to such an extent that the meals constituted cruel and unusual punishment in violation of his Eighth Amendment rights. During this time period, Hill launched a pilot program that shifted from a three meal-per-day food service to a two-meal-per day service in order to reduce the amount of times inmates were removed from their cells. Essentially, the breakfast and lunch meal were combined into a "brunch" meal.

On June 30, 2014, DeJesus filed this suit under 42 U.S.C. § 1983 alleging that Defendants had violated his Constitutional rights in a plethora of ways. Thereafter, the Court

conducted a merit review of DeJesus' Complaint under 28 U.S.C. 1915A and determined that his Complaint stated three claims: (1) a claim for deliberate indifference under the Eighth Amendment based upon the inadequate and non-nutritious food served to inmates (DeJesus asserted this claim against Defendants Quinn, Godinez, Yorkovich, Gossett, Pulley, Akpore, Rundle, and Carson); (2) Second, a conditions of confinement claim based upon the IDOC and Hill's policy of placing weaker inmates with stronger, more aggressive inmates and that this policy contributed to Evans' attack upon him (DeJesus asserted this condition of confinement claim against Defendants Collins, Damewood, Livingston, Steel, and Gibbs); and (3) a claim of deliberate indifference to his serious medical needs that arose after Evans' attack upon him (DeJesus asserted his deliberate indifference claim against Defendants Bennett, Dr. Sood, Wexford Health, Lindorff, Brown, Faetanini, Stockes, and Range).[1]

Defendants have now moved for summary judgment on the claims asserted by DeJesus against them. Further facts will be included *infra* as needed.

II.
LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Ruiz-Rivera v. Moyer,* 70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which

[1] At the merit review stage of this litigation, the Court determined that DeJesus' Complaint stated a medical malpractice claim against Dr. Sood under Illinois state law. The Court subsequently dismissed this claim under Federal Rule of Civil Procedure 12(b)(6) because DeJesus had failed to comply with the requirements of 735 ILCS 5/2-622 prior to filing this suit.

demonstrates that there is a genuine issue for trial. *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 294 (7th Cir. 1997). "[A] party moving for summary judgment can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993). "As with any summary judgment motion, we review cross-motions for summary judgment construing all facts, and drawing all reasonable inferences from those facts, in favor of the nonmoving party." *Laskin v. Siegel*, 728 F.3d 7314, 734 (7th Cir. 2013) (internal quotation marks omitted).

Accordingly, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue; he must do more than simply show that there is some metaphysical doubt as to the material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (Brennan, J., dissenting) (1986)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 818 (7th Cir. 1999). Finally, a scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252.

III.
DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT

A. Defendants were not deliberately indifferent to Plaintiff's serious medical need.

DeJesus' deliberate indifference claim fails as a matter of law for three reasons. *First*, DeJesus' claim fails against Defendant Brown and Lindorff because neither was personally involved in any action that allegedly violated DeJesus' Eight Amendment rights. "[I]ndividual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation.'" *Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010)(quoting *Palmer v. Marion County*, 327

F.3d 588, 594 (7th Cir. 2003)). The Seventh Circuit has explained that the doctrine of *respondeat superior* (a doctrine whereby a supervisor may be held liable for an employee's actions) has no application to § 1983 actions. *Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010).

Instead, in order for a supervisor to be held liable under § 1983 for the actions of his subordinates, the supervisor must "approve[] of the conduct and the basis for it." *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995)("An official satisfies the personal responsibility requirement of section 1983 . . . if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent.")(internal quotation omitted). "[S]upervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." *Backes v. Village of Peoria Heights, Illinois*, 662 F.3d 866, 870 (7th Cir. 2011) (quoting *Chavez*, 251 F.3d at 651)). "In short, some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery." *Gentry*, 65 F.3d at 561.

Here, DeJesus testified during his deposition that he sued Brown because she is a nursing supervisor at Hill and that he sued Lindorff because she is the healthcare administrator at Hill. As explained above, Brown and Lindorff's supervisory status alone does not subject them to liability under § 1983. DeJesus has not provided evidence of some causal connection between the alleged deliberate indifference and either Brown or Lindorff.[2] *Id.* Therefore, they are entitled to summary judgment.

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[2] Lindorff is entitled to summary judgment for additional reasons. As explained *infra*, DeJesus did not suffer from a serious medical need that necessitated the Eighth Amendment's protections. In any event, the undisputed evidence shows that Lindorff lacked the authority to authorize DeJesus to receive an X-ray, and Lindorff was entitled to rely upon the medical providers' decisions regarding the necessity of an X-ray without subjecting her to liability. *Hayes v. Snyder*, 546 F.3d 516, 527 (7th Cir. 2008).

Second, all of the Defendants against whom DeJesus asserts his deliberate indifference claim are entitled to summary judgment because DeJesus did not suffer from a serious medical need for purposes of the Eighth Amendment. "In order to prevail on a deliberate indifference claim, a plaintiff must show (1) that his condition was 'objectively, sufficiently serious' and (2) that the 'prison officials acted with a sufficiently culpable state of mind." *Lee v. Young*, 533 F.3d 505, 509 (7th Cir. 2008)(quoting *Greeno v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005)); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008)(same). "A medical condition is serious if it 'has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention.'" *Lee*, 533 F.3d at 509 (quoting *Greeno*, 414 F.3d at 653). "With respect to the culpable state of mind, negligence or even gross negligence is not enough; the conduct must be reckless in the criminal sense." *Id.*; *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994)("We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference.").

In other words, "[d]eliberate indifference is not medical malpractice; the Eighth Amendment does not codify common law torts. And although deliberate means more than negligent, it is something less than purposeful. The point between these two poles lies where the official knows of and disregards an excessive risk to inmate health or safety or where the official is both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he . . . draw the inference. A jury can infer deliberate indifference on the basis of a physician's treatment decision when the decision is so far afield of accepted professional

standards as to raise the inference that it was not actually based on a medical judgment." *Duckworth*, 532 F.3d at 679 (internal quotations and citations omitted). The Seventh Circuit has cautioned, however, that "[a] prisoner [] need not prove that the prison officials intended, hoped for, or desired the harm that transpired. Nor does a prisoner need to show that he was literally ignored. That the prisoner received some treatment does not foreclose his deliberate indifference claim if the treatment received was so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate his condition." *Arnett*, 658 F.3d at 751 (internal citations and quotations omitted).

It is undisputed that DeJesus received medical treatment for his injuries and complaints of pain after the attack. Therefore, DeJesus premises his deliberate indifference claim on his contention that these Defendants should have done more—such as order an X-ray sooner—to treat his medical needs and on his contention that Defendants lied in their affidavits and falsified the medical records to downplay the seriousness of his pain and suffering. Neither contention constitutes sufficient grounds to deny summary judgment.

The Eighth Amendment guarantees a prisoner treatment of his serious medical needs, not a doctor of his own choosing. *Estelle*, 429 U.S. at 104-106 (1976); *United States v. Rovetuso*, 768 F.2d 809, 825 (7th Cir. 1985). It does not guarantee access to the latest technology or to a specific medical test. *Glenn v. Barua*, 2007 WL 3194051, * 3 (3d Cir. 2007)(noting that "a decision not to use an x-ray or other diagnostic technique is "a classic example of a matter for medical judgment, and does not by itself amount to constitutionally deficient treatment.") (internal quotation omitted).

In other words, "[a] prisoner has the right to medical care; however, he does not have the right to determine the type and scope of the medical care he personally desires." *Carter v.*

Ameji, 2011 WL 3924159, * 8 (C.D. Ill. Sept. 7, 2011)(citing *Coppinger v. Townsend*, 398 F.3d 392, 394 (10th Cir. 1968)). "The Eighth Amendment does not require that prisoners receive unqualified access to healthcare. Rather, inmates are entitled only to adequate medical care." *Leyva v. Acevedo*, 2011 WL 1231349, * 10 (C.D. Ill. Mar. 28, 2011)(internal quotations omitted). Dr. Sood exercised his professional opinion that DeJesus did not need an X-ray until May 1, 2014. Just because DeJesus disagreed, that does not mean that Dr. Sood or any of the other medical providers were deliberately indifferent or that summary judgment must be denied. *Oden v. Mueller*, 1995 WL 417605, * 4 (7th Cir. July 13, 1995)(holding that the failure to refer the plaintiff to a specialist did not constitute deliberate indifference); *Young v. Winnebago County*, 2003 WL 1475384, * 1 (N.D. Ill. 2003)(holding that "a mere disagreement with prescribed course of treatment does not amount to deliberate indifference.").

"[A] difference of opinion between a physician and the patient does not give rise to a constitutional right, nor does it state a cause of action under § 1983." *Carter*, 2011 WL 3924159 at * 8. "A prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." *Snipes v. Detella*, 95 F.3d 586, 592 (7th Cir. 1996).

DeJesus may have believed that he needed an X-ray, but he has offered no evidence that Defendants possessed any medical evidence necessitating such action. Indeed, after DeJesus received an X-ray, it confirmed Dr. Sood's diagnosis. "A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent

professional would have so responded under those circumstances." *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998). DeJesus has offered no such evidence.

Moreover, DeJesus cannot simply challenge the veracity of Defendants' affidavits or the medical records in the hopes of defeating an otherwise proper motion for summary judgment. "Summary judgment is the 'put up or shut up' moment in a lawsuit." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010)(quoting *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003)). DeJesus offers no evidence—other than his rank speculation—that Defendants lied and that medical records were falsified, and that is not enough to defeat summary judgment.

Third, Wexford is entitled to summary judgment. Wexford, as some of the Defendants employer, may only be found liable to DeJesus if it had or maintained an unconstitutional policy or practice that caused him to suffer a constitutional deprivation. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691-92 (1978). DeJesus has failed to offer any evidence that Wexford maintains an unconstitutional policy or practice that caused him to suffer a constitutional deprivation. DeJesus states that Wexford has a policy of undertreating IDOC inmates because it wants to save money, but he presents no evidence to support his speculation regarding Wexford's motivation or any ill-effect that it had upon him. *Romero v. Morgan*, 2014 WL 1154037, * 7 (D. Md. Mar. 20, 2014)(granting summary judgment in Wexford and the other defendants' favor because "[t]here is simply no evidence to support Plaintiff's claim that he was denied recommended surgery for purposes of saving money.").

Furthermore, the Court has found that Wexford's employees are entitled to summary judgment on DeJesus' deliberate indifference claim, and unless they can be said to have been guilty of violating DeJesus' constitutional rights, Wexford's alleged policy that its employees were following cannot be said to have caused DeJesus to suffer any constitutional injury. *Ray v.*

Wexford Health Sources, Inc., 706 F.3d 864, 866 (7th Cir. 2013)(holding that it was unnecessary to determine what Wexford's policy was where the plaintiff failed to establish a constitutional problem with his treatment and did not suffer an actionable injury from the policy attributed to Wexford). In other words, Wexford cannot be held liable because its employees are not liable to DeJesus. *Dismukes v. Baker*, 2015 WL 1208654, * 2 (C.D. Ill. Mar. 13, 2015). Accordingly, summary judgment is granted in Defendants' favor on DeJesus deliberate indifference claim.

B. Defendants' food policy did not violate Plaintiff's Eighth Amendment rights

Furthermore, Defendants are entitled to summary judgment on DeJesus' food policy claim because the IDOC and Hill's food policy of serving two, rather than three meals, per day does not, based upon the evidence presented, constitute cruel and unusual punishment. The United States Supreme Court has made clear that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions;' it outlaws cruel and unusual 'punishments.'" *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). This means that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as an infliction of punishment." *Id.* at 838. More particularly for purposes of this case, the Eighth Amendment requires that prisons provide nutritionally and calorically adequate food to sustain health. *Smith v. Dart*, 803 F.3d 304, 312 (7th Cir. 2015)(*quoting* French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985)("The Constitution mandates that prison officials provide inmates with 'nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well-being of the inmates who consume it.'")

Accordingly, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from

which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. This type of deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Duckworth v. Frazen*, 780 F.2d 645, 653 (7th Cir. 1985). "[M]ere negligence or even gross negligence does not constitute deliberate indifference," *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996), and it is not enough to show that a prison official merely failed to act reasonably. *Gibbs v. Franklin*, 49 F.3d 1206, 1208 (7th Cir. 1995), *abrogated on other grounds, Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996).

In the instant case, DeJesus has offered no evidence that being fed two, rather than three, meals placed him at a substantial risk of harm or that Defendants knew of and disregarded that risk. On the contrary, Defendants have offered the affidavit of Suzann Bailey, a registered dietician, who testified that the two meals per day that DeJesus received of approximately 2200 to 2400 calories and a minimum of 8 ounces of protein provided adequate nutrition to an individual that is otherwise healthy and not in need of specific dietary accommodations for pre-existing medical conditions. DeJesus has not offered any admissible evidence to challenge Bailey's testimony or with which to create a genuine issue of material fact on this point. Rather, the undisputed evidence shows that DeJesus actually gained weight during the time that Hill provided only two meals per day.

In *Berry v. Brady*, 192 F.3d 504 (5th Cir. 1999), the United States Court of Appeals for the Fifth Circuit explained that "[w]hether the deprivation of food falls below this threshold depends on the amount and duration of the deprivation. Even on a regular, permanent basis, two meals a day may be adequate." *Id.* at 507 (internal quotations). Although DeJesus only received

two meals per day, the evidence before the Court shows that the meals were nutritiously adequate. DeJesus may have believed that the meals were not, but he has acknowledged that he is not a nutritionist. The only relevant evidence before the Court is that two meals were adequate.

And even if they were not, DeJesus has not presented any evidence that Defendants knew that they were inadequate, that they knew that the harm that an inadequate diet would cause to him, but that they continued to feed DeJesus the inadequate diet. Again, the evidence shows that Defendants relied upon the opinion of a registered dietician that feeding healthy inmates two meals per day would be adequate. Accordingly, DeJesus' Eighth Amendment claim based upon receiving only two meals per day fails as a matter of law.

C. Defendants' inmate cell placement policy did not violate Plaintiff's Eighth Amendment rights.

Finally, Defendants are entitled to summary judgment on DeJesus' claim that Defendants maintained an unconstitutional policy of placing weaker inmates with stronger ones to help maintain order at Hill and other IDOC facilities. Initially, the Court notes that DeJesus has offered no evidence to show that an unconstitutional policy exists regarding the placement and housing of inmates at Hill. Indeed, DeJesus admitted during his deposition that he does not know what the policies or procedures are for determining cell assignments at Hill.

The only evidence that DeJesus submits is an "offer of proof" as to what other inmates would testify to at trial regarding the placement of inmates in certain cells and the violence that ensued. However, DeJesus cannot mask hearsay as an offer of proof in an attempt to preclude summary judgment. *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009)(holding that a party cannot rely on inadmissible hearsay to oppose summary judgment).

On the other hand, Defendants have offered evidence that Hill maintains a rational policy regarding the placement and cell assignments for inmates. According to Defendants, inmates are initially screened at an IDOC Receiving Center when entering the IDOC. If an inmate is approved as suitable for double celling at the Receiving Center, that inmate arrives at Hill approved for double-celling generally but would be interviewed to determine specifics about the inmate. Cell assignments are then made based up several factors including: difference in age or physical size, Security Threat Group ("gang") affiliation, projected release dates, security issues, medical or mental health concerns, history of violence with cellmates, and racial issues. After cell assignments are made, an inmate can alert security staff that he feels he is in jeopardy.

Nothing about this policy appears to violate the Constitution facially. In addition, DeJesus have failed to demonstrate that the policy was unconstitutional as applied to him. The evidence shows that DeJesus is 5' 3" tall, weighs 159 pounds, is 64 years old, is of Puerto Rican decent, and has no gang affiliation. Jamie Evans is 5'10" tall, weighs 196 pounds, is of African American decent, and has no gang affiliation. A comparison of these factors did not preclude DeJesus and Evans from being cellmates.

To the extent that DeJesus is trying to morph his claim into one for failing to protect him from Evans' assault, his claim fails because Defendants did not have a reasonable opportunity to prevent the assault from occurring. "In failure to protect cases, a prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." *Pope v. Shafer*, 86 F.3d 90, 92 (7th Cir. 1996). Specifically, the Seventh Circuit has held:

> Under the Eighth Amendment, prison officials have a duty to protect prisoners from violence at the hands of other prisoners. An inmate can prevail on a claim that a prison official failed to protect him if the official showed deliberate indifference; that is, that the defendant was subjectively aware of and disregarded

> a substantial risk of serious harm to the inmate. To make a guard subjectively aware of a serious risk of attack, the inmate must communicate a specific and credible danger. But even when he is aware of a substantial risk of serious harm to an inmate, a prison guard is not liable if he responds reasonably to the risk, whether or not his response ultimately prevents the harm.

Gidarisingh v. Pollard, 2014 WL 3511697, * 3 (7th Cir. July 17, 2014)(internal quotations and citations omitted). "Once prison officials know about a serious risk of harm, they have an obligation to take reasonable measures to abate it." *Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008)(internal quotation omitted). "If prison officials are aware of a serious threat and do nothing, that is deliberate indifference." *Gidarisingh*, 2014 WL 3511697 at * 4. However, "a general risk of violence in a maximum security unit does not by itself establish knowledge of a substantial risk of harm." *Shields*, 664 F.3d at 181.

During his deposition, DeJesus acknowledged that he had no idea that an attack from Evans was going to occur. DeJesus also conceded that no one knew that an attack from Evans was imminent. Although DeJesus states that he notified Sergeant Gibbs that his cellmate was "too loud" a few weeks before the attack and that he requested to be moved, DeJesus conceded that he had no reason to know that Evans was going to attack him. In any event, the lack of specificity of the threat negates DeJesus' request to move as constituting sufficient notice to support a failure to protect claim.

Given DeJesus' testimony, it is clear that Defendants did not know that an attack from Evans was going to occur. Because Defendants lacked the requisite knowledge of the attack, they cannot be held liable for failing to prevent the attack. And, any connection between the policy regarding placing cellmates together and Evans' attack on DeJesus is simply too attenuated to support a finding of liability or denying summary judgment.

IT IS, THEREFORE, ORDERED:

1. Defendants' motions for summary judgment [98, 99, & 103] are GRANTED.

2. The Clerk of the Court is directed to enter judgment in Defendants' favor and against Plaintiff. All other pending motions are denied as moot, and this case is terminated, with the Parties to bear their own costs. All deadlines and settings on the Court's calendar are vacated.

3. If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4).

4. If Plaintiff wishes to proceed in forma pauperis on appeal, his motion for leave to appeal in forma pauperis must identify the issues that he will present on appeal to assist the Court in determining whether the appeal is taken in good faith. *See* Fed. R. App. P. 24(a)(1)(c); *Celske v. Edwards*, 164 F.3d 396, 398 (7th Cir. 1999)(an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a responsible assessment of the issue of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000)(providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff chooses to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

Entered this 14th day of September, 2016

s/ Sara L. Darrow
SARA L. DARROW
UNITED STATES DISTRICT JUDGE

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 30, 2018

DIANE P. WOOD, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 16-3664

HECTOR R. DEJESUS,
Plaintiff-Appellant,

v.

SALVADOR A. GODINEZ, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 1:14-cv-01260

Sara Darrow,
Judge.

ORDER

On consideration of the petition for rehearing filed by the plaintiff-appellant in the above case on January 26, 2018, all judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

Appedix C

Exh. C

Additional material from this filing is available in the Clerk's Office.