APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 18-3613

Craig Eugene Smith

Plaintiff Appellant

v.

James McKinney; Kelly Holder; Leslie Wagers; Niki Whitacre; Jonathan Janssen

Defendants Appellees

Appeal from United States District Court for the Southern District of Iowa - Des Moines

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Submitted: December 10, 2019
Filed: March 31, 2020

Before SMITH, Chief Judge, LOKEN and GRASZ, Circuit Judges.

SMITH, Chief Judge.

Craig Eugene Smith brought suit under 42 U.S.C.

1983 against prison officials with the Iowa Department of Corrections (IDC),[1] alleging violation of his due process rights in connection with discipline imposed on him. The prison officials moved for summary judgment, and the district court[2] granted the motion. The district court determined that "no reasonable juror could conclude Smith suffered an atypical and significant deprivation in relation to the ordinary incidents of prison life"; as a result, Smith could not "show he had a liberty interest at stake that required due process protections." *Smith v. McKinney*, No. 4:16-CV-00646-RP-HCA, 2018 WL 10483966, at *4 (S.D. Iowa Sept. 26, 2018). We affirm.

I. *Background*

In 1994, Smith was convicted of first-degree murder in Iowa state court and sentenced to life imprisonment. From April 4, 1995, to December 3, 2012, Smith was incarcerated at the ISP, a maximum security facility. Smith was transferred to the FDCF, a medium security facility, on December 4, 2012.

In May 2014, FDCF Captain Kelly Holder received a complaint from confidential sources against Smith

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[1] Smith named as defendants then-Ford Dodge Correctional Facility (FDCF) Warden James McKinney; FDCF Captain Kelly Holder; FDCF Correctional Officer Leslie Wagers; FDCF Correctional Officer Jonathan Janssen; and IDC Administrative Law Judge (ALJ) Niki Whitacre. Smith also sued Iowa State Penitentiary (ISP) Warden Nick Ludwick; however, the court dismissed Ludwick as a defendant after a suggestion of death was entered upon the record.

[2] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

brought under the Prison Rape Elimination Act (PREA).[3] Holder notified Smith that he would be placed in administrative segregation pending the investigation into Smith's alleged inappropriate sexual contact with other inmates.

Holder conducted an investigation into the complaint from May 28, 2014, through June 4, 2014. On June 4, 2014, Holder wrote Smith a disciplinary notice for the alleged conduct. FDCF Correctional Officer Leslie Wagers approved the notice, and FDCF Correctional Officer Jonathan Janssen served Smith with the notice on June 12, 2014. Janssen also investigated the allegations set forth in the disciplinary notice. The notice was based on confidential information from several sources.

Smith requested to speak with Correctional Counselor Stacy Mooney. On June 13, 2014, Smith spoke with Mooney and denied the allegations. He also told Mooney that "he would be willing to hurt an innocent person." Defs.' App. to Mot. for Summ. J. at 75, *Smith v. McKinney*, No. 4:16-cv-646-RP-HCA (S.D. Iowa Oct. 10, 2017), ECF No. 20-3.

On June 18, 2014, IDC ALJ Niki Whitacre conducted a hearing on the disciplinary notice. During the hearing, Smith again denied the allegations. He wanted to see the confidential information against him. Whitacre denied his request. Smith responded angrily. Whitacre found Smith guilty of several rule violations. In support of her findings, Whitacre cited the "[d]isciplinary notice dated 06/14/2014 written by

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[3] Holder was trained in conducting PREA investigations.

Holder; confidential statements/investigation; ICON [Iowa Corrections Offender Network] evidence; and statements by Offender." *Id.* at 76. She imposed a 365 days' loss of earned time, imposed a year of disciplinary detention with credit for 27 days served, and recommended that the prison classification committee transfer Smith back to the ISP for a more secure environment to protect other inmates and staff.

On July 11, 2014, consistent with the ALJ's order, IDC Offender Services transferred Smith back to the ISP for security reasons. On arrival, he was placed in segregation (otherwise known as "disciplinary detention" or the "hole") to serve the remainder of his disciplinary detention. The "Request Comments" in the "Offender Transfer to Institution" form set forth the "[r]eason for transfer" as being "[b]ased on the nature of the recent violations and Offender SMITH's concerning threats of harming others (see generic note dated 06/13/2014 [entered by Mooney])." *Id.* at 79. The form also set forth Smith's lengthy disciplinary history. Upon Smith's arrival to the ISP, he lost his job, wages, security classification, security points, and inmate tier status. Smith appealed the decision.

On July 30, 2014, then-FDCF Warden James McKinney denied Smith's appeal. In the "Disciplinary Appeal Response," McKinney stated that he had read the confidential information, visited with some of the confidential informants, and found the confidential informants credible. McKinney declined to reduce Smith's sanctions, stating, in part, "[Y]ou were granted an opportunity to move to a medium custody facility. You were immediately moved to the highest

level at [FDCF] due to your past history at your previous facility." *Id.* at 81. On September 14, 2014, then-ISP Warden Nick Ludwick denied Smith's supplemental appeal.

On October 9, 2014, Smith filed an action for post-conviction relief in the Iowa District Court for Lee County, challenging the PREA adjudication. The state court granted Smith's request for relief. The court explained that when evidence is based on confidential information, the ALJ must prepare a contemporaneous summary of the confidential information for the ICON. But the only summary from Whitacre that the state court received was dated two years after Smith's disciplinary hearing. Whitacre represented that she did not have the summary of confidential information. According to Whitacre, she did not keep case information for more than two years and had just purged her files. The state court found:

> The record before the court is that the ALJ did not prepare any type of independent documentation concerning the confidential information she relied upon until she was requested to do so in connection with this post-conviction relief trial. The procedure requiring an ALJ to make a summary of confidential information used by the ALJ contemporaneously to his or her decision-making did not take place in this case.

Id. at 92. Whitacre's failure to comply with the procedures resulted in the state court striking the confidential information from the record. "Without that confidential information," the court explained, "there is

not even 'some evidence' to support the disciplinary allegations against [Smith]." *Id.* at 92–93. The state court granted Smith's application for postconviction relief, ordered that Smith's discipline records "reflect that he was not found to have violated the rules as identified in the disciplinary notice," and assessed the costs of the matter to the State of Iowa. *Id.* at 93. Because Smith "ha[d] already served the disciplinary detention," the court could not order removal of the sanction. *Id.*

Pursuant to the state court's ruling, the IDC restored Smith's 365 days of earned time and expunged the report from his disciplinary record. But the IDC did not transfer Smith back to the FDCF, a medium security facility. Instead, he remains at the ISP, and his former security classification, security points, and tier status have not been restored. Smith also does not have a job or earn wages as he had previously in FDCF.

Smith brought suit under § 1983 against the IDC prison officials, alleging that the prison officials violated his due process rights under the Fourteenth Amendment by moving him indefinitely from the FDCF, a medium security facility, to the ISP, a maximum security facility, based on a now-expunged disciplinary report. The prison officials moved for summary judgment, and the district court granted the motion. The district court determined that "no reasonable juror could conclude Smith suffered an atypical and significant deprivation in relation to the ordinary incidents of prison life"; as a result, Smith could not "show he had a liberty interest at stake that required

due process protections." *Smith*, 2018 WL 10483966, at *4.

II. *Discussion*

On appeal, Smith argues that the district court erroneously granted summary judgment to the prison officials on his due process claim. He asserts that he has a liberty interest protected by the Due Process Clause of the Fourteenth Amendment in avoiding prison conditions that are restrictive or extreme in comparison to conditions at other prisons. According to Smith, he suffered an atypical and significant hardship upon his transfer to the ISP. In support, he cites (1) the indefinite duration of his confinement at the ISP, a maximum security facility; and (2) the deprivation of his employment, wages, security classification, security points, and inmate tier status upon his transfer to the ISP. In addition, he maintains that his 365-day term in disciplinary detention subjected him to conditions "substantially worse than [his] previous environment." Appellant's Br. at 12. He asserts that "[a] reasonable jury could have found on these facts that Smith's disciplinary detention and transfer to the [ISP] imposed a deprivation that was an atypical and significant hardship in relation to the ordinary incidents of prison life." *Id.* According to Smith, "the decision to commit [him] to disciplinary detention and transfer him in the first instance was based on a disciplinary allegation and report that has since been expunged because a court held that there was not even 'some evidence' that [he] violated the prison rules." *Id.*

We review de novo a district court's grant of summary judgment. *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1207 (8th Cir. 2013).

> The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake. A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word liberty, or it may arise from an expectation or interest created by state laws or policies.

Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (cleaned up). "With regard to the latter, we focus on 'the nature of the deprivation' resulting from a state regulation, rather than 'the language of a particular regulation.'" *Wilkerson v. Goodwin*, 774 F.3d 845, 852 (5th Cir. 2014) (citing *Sandin v. Conner*, 515 U.S. 472, 481, 482–84 (1995); *Wilkinson*, 545 U.S. at 222–23).

"Once a liberty interest is established, the next question is what process is due." *Williams v. Norris*, 277 F. App'x 647, 649 (8th Cir. 2008) (per curiam) (citing *Wilkinson*, 545 U.S. at 224). "We need reach the question of what process is due only if the inmates establish a constitutionally protected liberty interest . . . ." *Wilkinson*, 545 U.S. at 221.

The Supreme Court has "held that the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement." *Id.* (citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976)). An inmate "has no constitutional right to

remain in a particular institution." *Askew v. Heflin*, 67 F.3d 303, 303 (8th Cir. 1995) (unpublished per curiam). This is true even if the inmate was transferred to "a higher-security institution [that] presented a more restrictive environment than [the prior institution]." *Freitas v. Ault*, 109 F.3d 1335, 1337 (8th Cir. 1997) (citing *Moorman v. Thalacker*, 83 F.3d 970, 973 (8th Cir. 1996) (transfer from minimum- to medium-security institution)). "In fact, prison administrators may ordinarily transfer a prisoner for whatever reason or for no reason at all." *Cornell v. Woods*, 69 F.3d 1383, 1387 (8th Cir. 1995) (cleaned up).[4]

But the Supreme Court "ha[s] also held . . . that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)." *Wilkinson*, 545 U.S. at 222. "*Sandin* involved prisoners' claims to procedural due process protection before placement in segregated confinement for 30 days, imposed as discipline for disruptive behavior." *Id.* The Supreme Court held that inmates possess a state-created liberty interest in avoiding assignment to conditions of confinement that "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 223 (quoting *Sandin*, 515 U.S. at 484). "[T]he nature of [the] conditions [of confinement] 'in relation to the ordinary incidents of prison

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[4] "[T]hese precepts are limited by the prohibition against transferring a prisoner in retaliation for the inmate's exercise of a constitutional right." *Id.* at 1387.

life'" is "the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement." *Id.* (quoting *Sandin*, 515 U.S. at 484). "Applying this refined inquiry, *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not 'present a dramatic departure from the basic conditions of [the inmate's] sentence.'" *Id.* (alteration in original) (quoting *Sandin*, 515 U.S. at 485). In reaching this determination, the Supreme Court noted the following: (1) "inmates in the general population experienced 'significant amounts of "lockdown time"'"; (2) "the degree of confinement in disciplinary segregation was not excessive"; and (3) "the short duration of segregation [did not] work a major disruption in the inmate's environment." *Id.* (quoting *Sandin*, 515 U.S. at 486).

In summary, "[t]he *Sandin* standard requires [a court] to determine if [the confinement] 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* (quoting *Sandin*, 515 U.S. at 484); *see also Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003). "The duration and degree of restrictions bear on whether a change in conditions imposes such a hardship." *Hamner v. Burls*, 937 F.3d 1171, 1180 (8th Cir. 2019), *as amended* (Nov. 26, 2019).

The issue of whether conditions of confinement constitute an atypical and significant hardship is a question of law for the court to determine when the facts are undisputed. *See, e.g.*, *Skinner v. Schriro*, 399 F. App'x 223, 224 (9th Cir. 2010) (mem. op.) ("The dis-

trict court properly granted summary judgment in defendants' favor because Skinner failed to raise a triable issue of fact as to whether his placement in the violence control unit constituted such an 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life' so as to give rise to a protected liberty interest." (alteration in original) (quoting *Sandin*, 515 U.S. at 484)); *Sealey v. Giltner*, 197 F.3d 578, 585 (2d Cir. 1999); *Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997) (explaining that the "atypical and significant hardship" inquiry is "necessarily . . . fact specific in that it requires a determination of the conditions the prisoner maintains give rise to a liberty interest and those incident to normal prison life" but that "the ultimate determination of whether the conditions impose such an atypical and significant hardship that a liberty interest exists is a legal determination, subject to de novo review.").[5]

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[5] In *Portley El v. Brill*, the inmate claimed "that the district court erred in dismissing his due process claims under *Sandin* because whether prison discipline 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' is a fact question unsuitable for resolution solely on the basis of an inmate's complaint." 288 F.3d 1063, 1065 (8th Cir. 2002). "We agree[d] that atypical and significant hardship is a *question of fact* that may require a fuller record than the initial complaint." *Id.* (emphasis added). But, we nevertheless found that the inmate failed to "allege a liberty interest, did not describe [the inmate's] conditions of confinement in Minnesota punitive segregation or Colorado administrative segregation, and did not allege that those conditions were atypical and significant hardships in relation to the ordinary incidents of his prison life." *Id.* Because the inmate failed to "make a threshold showing that the deprivation of which he complains imposed an 'atypical and significant hardship,'" we held that the inmate's "due process

Post-*Sandin*, "the Court of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system." *Wilkinson*, 545 U.S. at 223 (citing cases). The Supreme Court has acknowledged "the difficulty of locating the appropriate baseline" by which to measure what constitutes an atypical and significant hardship, but it has not resolved the issue. *Id.* Instead, in *Wilkinson*, the Supreme Court held that inmates' assignment to a state supermax prison "impose[d] an atypical and significant hardship under any plausible baseline." *Id.* At the state supermax prison, the inmates were prohibited from "almost all human contact . . . , even to the point that conversation [was] not permitted from cell to cell." *Id.* at 223–24. In addition, "the light, though it may be dimmed, [was] on for 24 hours." *Id.* at 224. And, the inmates were permitted only one hour of exercise per day. *Id.* These conditions, the Court recognized, "likely would apply to most solitary confinement facilities," "[s]ave perhaps for the especially severe limitations on all human contact." *Id.* But the Court identified "two added components." *Id.*

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claims were defectively pleaded." *Id.* (first quoting *Sims v. Artuz*, 230 F.3d 14, 22 (2d Cir. 2000), then citing *Howard v. Collins*, 129 F.3d 121, 1997 WL 710314 (8th Cir. 1997) (unpublished per curiam); *Hemphill v. Delo*, 124 F.3d 208, 1997 WL 581072 (8th Cir. 1997) (unpublished per curiam)).

Portley El's statement that "atypical and significant hardship is a question of fact" is not contrary to our recognition that when the facts as to the conditions of confinement are *undisputed* on summary judgment, it is appropriate for the court to decide the *Sandin* issue as a matter of law.

The first additional component was the duration of the placement. *Id.* "Unlike the 30-day placement in segregated confinement at issue in *Sandin*, placement at [the state supermax facility] [was] indefinite and, after an initial 30-day review, [was] reviewed just annually." *Id.* The second additional component was "that placement disqualifies an otherwise eligible inmate for parole consideration." *Id.* "[T]aken together," the Court held, these conditions "impose[d] an atypical and significant hardship within the correctional context." *Id.* Therefore, the Court concluded that the inmates had "a liberty interest in avoiding assignment to [the state supermax facility]." *Id.*

Despite the lack of an established "baseline from which to measure what is atypical and significant in any particular prison system," *id.* at 223, we have affirmatively held what does *not* constitute an atypical or significant deprivation. "We have consistently held that a demotion to segregation, even without cause, is not itself an atypical and significant hardship." *Phillips*, 320 F.3d at 847; *see also Portley El*, 288 F.3d at 1065 ("We have consistently held that administrative and disciplinary segregation are not atypical and significant hardships under *Sandin*."). Indeed, "*Sandin* teaches that [an inmate] has no due process claim based on [a] somewhat more restrictive confinement because he has no protected liberty interest in remaining in the general prison population; his only liberty interest is in not being subjected to 'atypical' conditions of confinement." *Wycoff v. Nichols*, 94 F.3d 1187, 1190 (8th Cir. 1996).

As a result, "to assert a liberty interest," the inmate "must show some difference between his new

conditions in segregation and the conditions in the general population which amounts to an atypical and significant hardship." *Phillips*, 320 F.3d at 847; *see also Moorman*, 83 F.3d at 973 (concluding that the inmate's "detention appear[ed] no more severe than that in *Sandin*" and did "not appear to have been a disruption exceeding the ordinary incidents of prison life").

For example, in *Kennedy v. Blankenship*, the inmate was "found . . . guilty of violating prison rules and sentenced . . . to thirty days in 'punitive isolation,' a stricter form of custody than the 'administrative segregation' status [the inmate] had at the time." 100 F.3d 640, 641 (8th Cir. 1996). We held that the inmate's due process rights were not violated even though the inmate "lost more privileges as a result of his punishment than did the inmate in *Sandin*." *Id.* at 642. Specifically, the inmate lost "the privilege of working and the accompanying good time credits" while in punitive isolation. *Id.* at 642 n.2. And, while in punitive isolation, the inmate "face[d] restrictions on mail and telephone privileges (privileged mail and emergency calls only), visitation privileges (the inmate's attorney only, rather than biweekly general visitation), commissary privileges, and personal possessions (legal materials, a religious text, soap, toothbrush, toothpaste, washcloth, and toilet paper only)." *Id.* Although inmates "referr[ed] to punitive isolation as 'the hole,'" we found it "abundantly clear that that description is a significant exaggeration of actual conditions." *Id.* "Considering all the circumstances, we conclude[d] that [the inmate's] transfer from administrative segregation to punitive isolation was not 'a

dramatic departure from the basic conditions' of his confinement and thus [did] not constitute 'the type of atypical, significant deprivation in which a state might conceivably create a liberty interest.'" *Id.* at 643 (quoting *Sandin*, 515 U.S. at 485–86).

Similarly, in *Freitas*, the analysis focused on "whether the conditions of [the inmate's] confinement after [the inmate's] transfer [from a minimum security facility to a medium security facility] constituted a hardship that could reasonably be characterized as atypical and significant." 109 F.3d at 1337 (internal quotation omitted). We held that Freitas's conditions of confinement did not meet that standard. We reasoned that even though the inmate was transferred to "a higher-security institution [that] presented a more restrictive environment . . . , there [was] no liberty interest in assignment to any particular prison." *Id.* We further noted that the inmate had previously been housed at the medium security facility before coming to the minimum-security facility. *Id.* at 1336. As a result, "[w]e fail[ed] to understand . . . why a return to an institution previously inhabited by an inmate whose custody rating matches that of the institution can be a departure from the ordinary incidents of prison life." *Id.* at 1338. We determined that the inmate's "ten days of administrative segregation . . . and . . . thirty days of 'on-call' status" were not "'atypical and significant' deprivations." *Id.* Finally, we held that the inmate's "loss of a higher-paying job and other privileges" and his "lost ability to earn good time (when no previously earned bonus time had been revoked and the loss evidently had no other practical

effect on [the inmate's] sentence)" did not amount to "an atypical hardship." *Id.*

In the present case, Smith argues that the conditions of confinement he endured while in segregation and upon his transfer to the ISP imposed an atypical and significant hardship on him in relation to the ordinary incidents of prison life. First, he cites as an atypical and significant hardship his transfer from the FDCF, a medium security facility, back to the ISP, a maximum security facility, for an indefinite duration. According to Smith, he "has been in the maximum security facility for nearly five years, and there is no sign that he will be moved to a less restrictive prison anytime soon." Appellant's Br. at 17. "Although [ISP] was a higher-security institution . . . , there is no liberty interest in assignment to any particular prison." *Freitas*, 109 F.3d at 1337. Moreover, Smith was returning to an institution that he previously inhabited. *See id.* at 1338 ("We fail to understand, moreover, why a return to an institution previously inhabited by an inmate whose custody rating matches that of the institution can be a departure from the ordinary incidents of prison life.").

Because the transfer to a higher security facility alone is insufficient to establish an atypical and significant hardship, we must examine "whether the conditions of [Smith's] confinement [in administrative segregation at the FDCF and] after his transfer [to the ISP] constituted a hardship that could reasonably be characterized as atypical and significant." *Id.* at 1337 (internal quotation omitted). As an initial matter, Smith notes that he was subjected to 365 days of

disciplinary detention. He was first placed in administrative segregation while at the FDCF and then placed in disciplinary detention, otherwise known as "the hole," upon his arrival to the ISP. But Smith has failed to set forth facts describing his conditions of confinement while in administrative segregation and disciplinary detention. Smith's reference to disciplinary detention as "the hole" is not descriptive of what conditions he faced. *Cf. Blankenship*, 100 F.3d at 641 n.2 ("[A]lthough prisoners in Arkansas apparently refer to punitive isolation as 'the hole,' it is abundantly clear that that description is a significant exaggeration of actual conditions."). Without a description of the conditions of confinement while in segregation, we are left with our precedent "that demotion to segregation, even without cause, is not itself an atypical and significant hardship." *Phillips*, 320 F.3d at 847.

Smith also cites his loss of employment, wages, security classification, security points, and inmate tier status upon his transfer to the ISP. But none of these losses, individually or collectively, amounts to an atypical and significant hardship under our precedent. *See, e.g.*, *Freitas*, 109 F.3d at 1338 (concluding that inmate's "loss of a higher-paying job and other privilege" did not "constitute[] an atypical hardship"); *Blankenship*, 100 F.3d at 642 n.2 (concluding that inmate's loss of "the privilege of working and the accompanying good time credits" while in punitive isolation did not constitute an atypical hardship).

Because we hold that the conditions of confinement that Smith faced during administrative segregation at the FDCF and upon his transfer to the ISP

do not amount to an atypical and significant deprivation when compared to the ordinary incidents of prison life, we affirm the district court's grant of summary judgment to the prison officials on Smith's due process claim.

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

APPENDIX B

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

CRAIG EUGENE SMITH, #0802783, Plaintiff, vs. JAMES McKINNEY, et al., Defendants.	**4:16-cv-00646-RP-HCA** **ORDER DISMISSING DEFENDANT LUDWICK AND GRANTING MOTION FOR SUMMARY JUDGMENT**

Plaintiff Craig Eugene Smith, now represented by counsel, brings this action under 42 U.S.C. § 1983. Amended Compl., ECF No. 16. Smith names as Defendants Nick Ludwick, James McKinney, Kelly Holder, Leslie Wagers, Niki Whitacre, and Jonathon Janssen. Smith claims Defendants violated his due process rights in connection with discipline imposed on him at the Fort Dodge Correctional Facility (FDCF). He seeks declaratory relief and damages. He also seeks expungement of all reports and notes received while he served the sanction be expunged. *Id.* at 3–9.

Defendants entered a suggestion of death upon the record for Defendant Nick Ludwick and ask that he be removed as a party. Suggestion of Death, ECF No. 38 (filing pursuant to Fed. R. Civ. P. 25). Plaintiff filed no objection. The Court will therefore dismiss Nick Ludwick as a Defendant in this case.

The remaining Defendants move for summary judgment, which Plaintiff resists.[1] ECF Nos. 20, 35, 39. For the following reasons, the Court must grant Defendants' motion.

I. SUMMARY JUDGMENT STANDARD

The Court will grant summary judgment if, viewing the evidence in the light most favorable to the nonmoving party, "no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The non-moving party receives the benefit of all reasonable inferences supported by the evidence, but has 'the obligation to come forward with specific facts showing that there is a genuine issue for trial.'" *Atkison v. City of Mt. View*, 709 F.3d 1201, 1207 (8th Cir. 2013) (quoting *Dahl v. Rice Cnty.*, 621 F.3d 740, 743 (8th Cir. 2010)).

To avoid entry of summary judgment, the nonmovant must make a sufficient showing on every essential element of its case for which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). To show a fact is genuinely disputed, a party must support the assertion by:

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[1] Smith's appendix to his resistance includes many documents that already were in Defendants' appendix. Under Local Rules, Smith should have included only materials that were not already submitted in Defendants' appendix. "The resisting party's appendix must include those parts of the pleadings, depositions, answers to interrogatories, admissions, exhibits, and affidavits not already included in the moving party's appendix upon which the resisting party relies in resisting the motion." LR 56(e).

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1)(A) & (B). The quantum of proof the nonmoving party must produce is not precisely measurable, but it must be enough evidence "such that a reasonable jury could return a verdict for the nonmovant." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("opponent must do more than simply show that there is some metaphysical doubt as to the material facts"); *Williams v. City of Carl Junction*, 480 F.3d 871, 873 (8th Cir. 2007) ("The nonmoving party must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact or trial.") (internal quotations omitted)).

All evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in the nonmoving party's favor. *Grant v. City of Blytheville*, 841 F.3d 767, 770 (8th Cir. 2016).

II. SUMMARY OF MATERIAL FACTS

During the time relevant to the complaint, Smith was an inmate at the Fort Dodge Correctional Facility and Defendants were employees there. In 2014, Defendant Kelly Holder, gave Smith notice that he was being placed in administrative segregation and investigated for inappropriate contact with another inmate. Defs.' Ex. G, ECF No. 20–3 at 73. Holder then wrote Smith a disciplinary report for violating prison disciplinary rules against threats and intimidation, sexual misconduct, obstructive/disruptive conduct, sexual violence, and attempt or complicity. The report was based on confidential statements, and the names of inmates and the statements were kept confidential. Defendant Leslie Wagers approved the report. Defs.' Ex. F, ECF No. 20–3 at 72. Defendant Jonathan Janssen served Smith notice of the disciplinary report. *Id.* Janssen also investigated the violations. Defs.' Ex. H, ECF No. 20–3 at 74.

Smith has been an inmate of the Iowa Department of Corrections since 1994. Defs.' Ex. B, ECF No. 20–3 at 4. He has lived at various places, including the Iowa State Penitentiary and the Fort Dodge Correctional Facility. *Id.* Except for the incident in 2014, Smith never was disciplined for sexually harassing or assaulting other inmates. Defs.' Ex. C, ECF No. 20–3 at 5–8. After receiving notice of the alleged sexual misconduct against inmates in 2014, Smith became upset while speaking with his counselor stating, among other things, he did not do the alleged acts and never would. Defs.' Ex. I, ECF No. 20–3 at 75.

Defendant Niki Whitacre, the Administrative Law Judge, conducted a hearing on the disciplinary notice. Defs.' Ex. J, ECF No. 20–3 at 76–77. During the hearing, Smith asked to see the witness statements and became angry after he was denied. *Id.* at 76. Whitacre she determined Smith violated all the rules charged except attempt or complicity. *Id.* For the evidence relied on, Whitacre cited the disciplinary notice, "confidential statements/investigation; ICON evidence; and statements by the Offender." *Id.* She imposed a year of loss of earned time, a year of disciplinary detention with credit for twenty-seven days served, recommendation that Smith be transferred "back to [Iowa State Penitentiary] for a more secured environment in order to protect staff and offenders from victimization." *Id.* at 77.

Smith appealed. Defendant Warden Jim McKinney denied the appeal. Defs.' Ex. M, ECF No. 20–3 at 81–82. McKinney wrote, "I have read and visited with some of these confidential informants as well as some other offenders that lived in the same living unit as you. . . . The informants did clearly prove to be credible and reliable." *Id.* at 81.

Smith was transferred to the Iowa State Penitentiary. Defs.' Ex. L, ECF No. 20–3 at 79–80. Nick Ludwick, who was then Warden at the Iowa State Penitentiary, denied Smith's supplemental appeal. Defs.' Ex. O, ECF No. 20–3 at 84.

Smith filed an action for postconviction relief in the Iowa District Court for Lee County. Defs.' Ex. P, ECF No. 20–3 at 85–88. The Iowa District Court granted Smith's request for relief. Defs.' Ex. Q, ECF

No. 20–3 at 89–93. The state court held the discipline must be based on "some evidence." *Id.* at 91 (citations omitted). The state court held that when the evidence is based on confidential information, the administrative law judge must prepare a contemporaneous summary of the confidential information for the Iowa Corrections Offender Network (ICON). *Id.* at 91–92; *see also* Defs.' Ex. E, ECF No. 20–3 at 35–36 (describing the procedures for use of confidential information). The only summary the state court received was a summary from Whitacre dated two years after Smith's disciplinary hearing. ECF No. 20–3 at 92; Defs.'s Ex. R, ECF No. 20–3 at 94–95. According to Whitacre, she did not have the summary of confidential information but had just purged her files because she did not keep case information for more than two years. ECF No. 20–3 at 94. The state court found:

> The record before the court is that the ALJ did not prepare any type of independent documentation concerning the confidential information she relied upon until she was requested to do so in connection with this post-conviction relief trial. The procedure requiring an ALJ to make a summary of confidential information used by the ALJ contemporaneously to his or her decision-making did not take place in this case.

ECF No. 20–3 at 92. The state court ruled that Whitacre's failure to comply with the procedures required it to strike the confidential information from the record. It ruled, "Without that confidential in-

formation, there is not even 'some evidence' to support the disciplinary allegations against" Smith. *Id.* at 92–93. The state court therefore granted Smith's request for postconviction relief and ordered that the disciplinary record reflect that Smith was found not to have violated the rules. Because Smith already served the disciplinary detention imposed, it held "that sanction cannot be removed." *Id.* at 93.

As a result of the report, Smith lost his job and wages. Defs.' Ex. T, ECF No. 20–3 at 98–106. He remains at Iowa State Penitentiary, where he has been denied his former security classification, security points, and tier status. *Id.* at 99.

III. DISCUSSION

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. When a person asserts the deprivation of liberty without due process, the court first determines whether a protected liberty interest is at stake. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Smith acknowledges he did not have a liberty interest in having state officers follow their own prison regulations. ECF No. 35–1 at 6; *see Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003). Smith also did not have a right to have a job, or be housed in any particular custody level or classification. *See Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) (Constitution itself does not confer any right upon an inmate to any particular security classification); *Meachum v. Fano*, 427 U.S. 215, 225 (1976) ("Confinement in any of the State's institutions is

within the normal limits or range of custody which the conviction has authorized the State to impose."); *see also Freitas v. Ault*, 109 F.3d 1335, 1337 (8th Cir. 1997) ("there is no liberty interest in assignment to any particular prison"); *Lomholt v. Holder*, 287 F.3d 683, 684 (8th Cir. 2002) (per curiam) (prisoner has "no constitutional right to a particular prison job").

To determine whether Smith has a liberty interest in avoiding particular conditions, the Court considers whether the deprivations imposed on Smith were "atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). It is "the nature of those conditions themselves 'in relation to the ordinary incidents of prison life'" that determine whether state officials must provide due process protections before imposing them. *Wilkinson*, 545 U.S. at 223 (quoting *Sandin*, 515 U.S. at 484).

Defendants argue Smith suffered no atypical and significant deprivation, therefore he had no liberty interest at stake that required due process protections. ECF No. 20–1 at 4–5. In response, Smith relies on *Wilkinson* to argue there is a jury question whether his own deprivation was atypical and significant. ECF No. 35–1 at 7–8. In *Wilkinson*, the Supreme Court held the inmate had a liberty interest in avoiding transfer to an Ohio supermax prison. *Wilkinson*, 454 U.S. at 224. The Supreme Court did not identify a baseline for what would be atypical and significant deprivation, but it held the inmate's "assignment to OSP imposes an atypical and significant hardship under any plausible baseline." *Id.* at

223. It described in detail the conditions that made assignment to the supermax facility an atypical and significant deprivation:

> For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.

Id. at 223–24 (citations omitted); *see also id.* at 214–15 (describing the conditions at the supermax prison compared to other Ohio prisons). Granting that *Wilkinson* does not describe the floor for what constitutes an atypical and significant deprivation, the Court nevertheless concludes there is not a genuine issue for trial on this record. The problem for

Smith is he does not describe the sort of deprivations that, either alone or in aggregate, might be considered an atypical and significant deprivation in relation to the ordinary incidents of prison life. Smith states he was sent from a medium security institution to a maximum security institution, but, unlike the description in *Wilkinson*, Smith provides no details about what life is like at either institution. ECF No. 35–1 at 8. Smith served a year of disciplinary detention, which is significantly longer than the thirty days imposed in *Sandin*, 515 U.S. at 486. Yet Smith provides no facts describing how the detention he served differs from other types of confinement. Along with the length of the duration of the sanction, another reason the Court in *Sandin* concluded the sanction did not give rise to a liberty interest is it "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.* Without a comparison between inmates inside and outside of segregation or other "totally discretionary[] confinement," it is not possible for the Court to conclude Smith creates a genuine dispute that his placement in segregation for even a year "work[ed] a major disruption in his environment." *Id.* Smith states he lost security points and tier status, but the record is quiet on the difference in living conditions for inmates at those different security and tier statuses.

At the summary judgment stage, to create a jury question Smith must do more than identify deprivations without putting them into factual context. Based on this summary judgment record, no reasonable juror could conclude Smith suffered an atypical

and significant deprivation in relation to the ordinary incidents of prison life. Smith therefore cannot show he had a liberty interest at stake that required due process protections. Consequently, Defendants are entitled to judgment as a matter of law, and the Court must grant their motion for summary judgment.[2]

IV. CONCLUSION

Based on the suggestion of death on the record, ECF No. 38, Defendant Nick Ludwick is dismissed from the case. The Court grants Defendants' motion for summary judgment. ECF No. 20. Judgment shall be entered in favor of the remaining Defendants. This case is dismissed.

IT IS SO ORDERED.

Dated this 26th day of September, 2018.

/s/ Robert W. Pratt
Robert W. Pratt
U.S. District Judge

[2] Because the Court must grant Defendants' motion for summary judgment based on Smith's failure to create a genuine question whether a liberty interest is at stake, the Court does not address Defendants' other grounds for summary judgment.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-3613

Craig Eugene Smith

Appellant

v.

James McKinney, et al.

Appellees

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:16-cv-00646-RP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 26, 2020

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

IN THE IOWA DISTRICT COURT FOR LEE COUNTY (NORTH)

CRAIG SMITH, Applicant, vs. STATE OF IOWA, Respondent.	Cause No. PCLA 006326 RULING ON APPLICATION FOR POSTCONVICTION RELIEF

The Applicant filed his Application for Postconviction Relief on October 9, 2014. Said application proceeded to trial at the Iowa State Penitentiary on May 24, 2016. The Applicant appeared as a self-represented litigant at the hearing; the Respondent was represented by Assistant Attorney General John McCormally. The court heard the testimony of the Applicant. In addition, the court received into evidence State's Exhibit 1, administrative record. The State also offered Exhibit 2, confidential information utilized by the Administrative Law Judge. Said confidential information was not available at the time of the hearing. The record was left open for the State to submit said confidential record. The court received the confidential record marked as Exhibit 2, plus CI-1, comments from the ALJ. The court also at a later date received Exhibit 2-2, Policies and Procedures 10-RD-03; Exhibit 3, PREA Standards for Adult Prisons and Jails; and Applicant's Exhibit A, a portion of the PREA Standards.

The court further heard the statements and comments of the Applicant and the Assistant Attorney General.

COURSE OF PROCEEDINGS AND FINDINGS OF FACT

1. On June 4, 2014, a disciplinary notice was issued, which was served upon the Applicant on June 12, 2014. At the time the Applicant was an inmate at the Ft. Dodge Correctional Facility in Webster County, Iowa. It was alleged that while incarcerated at the Ft. Dodge Correctional Facility, the Applicant had violated Disciplinary Rules 14, Threats/Intimidation; 15, Sexual Misconduct; 27, Obstructive/Disruptive Conduct; 41, Sexual Violence; and 43, Attempt or Complicity.

2. The disciplinary notice was issued based upon confidential complaints that the Applicant was sexually abusive to offenders.

3. A hearing w.as held before the ALJ on June 24, 2014. The ALJ based her decision upon the disciplinary notice, the statements of the offender, and the confidential statements and investigation materials. She found the Applicant to have violated Rules 14, Threats/Intimidation; 15, Sexual Misconduct; 27, Obstructive/Disruptive Conduct; and 41, Sexual Violence. The sanction imposed was 365 days of disciplinary detention and 365 days' loss of earned time.

4. The Applicant appealed this decision to the warden. By the time the appeal was processed, the Applicant had been transferred to the Iowa State

Penitentiary in Lee County. As a result, the ISP warden denied the appeal on September 14, 2014. Having exhausted his administrative remedies, the Applicant filed this postconviction relief action on October 9, 2014.

CONCLUSIONS OF LAW

During the hearing, the Applicant's primary challenge to the discipline was that he did not commit the alleged violations. In addition, he also asserted that the policies concerning the use of confidential information were not followed. In his written appeal to the warden, the Applicant also stated that the proper standards were not followed in determining the credibility of the confidential informants. In a supplement to his appeal on August 1, 2014, the Applicant mere1y reiterated his earlier challenge.

In this situation the entire case and set of allegations against the Applicant is based upon confidential information. The disciplinary notice itself is based upon a confidential informant's complaint. The Investigator had no independent information besides the confidential information. The statements made by the Applicant during the hearing which the ALJ relied upon were not incriminating. As a result, in order for this discipline to be sustained, the confidential information used must constitute "some evidence." Backstorm v. State, 508 N.W.2d 705, 710 (Iowa 1993), citing Superintendent v. Hills, 472 U.S. 445, 455 (1985). In addition, the confidential information procedures must have been property followed. If for any reason the confidential

information portion of this investigation is eliminated, there is no other evidence to reach the level of "some evidence" to support the ALJ's decision.

State's Exhibit 2-2 is the DOC Policies & Procedures for Major Discipline Report Procedures, Policy No. IO-RD-03. Rule IV(D)(12) and (13) provide:

> (12) Where confidential information is involved, the ALJ shall view the evidence prior to meeting with the accused offender.
>
> (13) The ALJ shall make findings after meeting with the offender in accordance with the procedures for the use of confidential information described below if the ALJ uses or relies on the confidential information.

Rule IV(F) sets forth the procedures for the use of confidential information, included in these procedures is a requirement that whenever confidential information is used, the ALJ is to prepare a summary on ICON. The summary will not be disclosed to the offender and shall include the following specific information:

> (a) brief summaries of all confidential information availab1e to the ALJ;
>
> (b) either the name or relationship to the institution of any informants;
>
> (c) the confidential information relied upon by the ALJ;
>
> (d) the reasons supporting use of confidential information;

(e) an indication why the information is being kept from the offender.

The court received Exhibit C-I-1, a confidential summary statement, from the ALJ dated July 18, 2016. Based upon this document, it is clear that the ALJ did not prepare a summary as required by the Policies & Procedures[1]. The record before the court is that the ALJ did not prepare any type of independent documentation concerning the confidential information she relied upon until she was requested to do so in connection with this postconviction relief trial. The procedure requiring an ALJ to make a summary of the confidential information used by the ALJ contemporaneously to his or her decision-making did not take place in this case. As a result, the court concludes that the failure to comply with the procedures for the use of confidential information requires this court to strike from the factual record said confidential information. Without that confidential information, there is not even "some evidence" to support the disciplinary allegations against the Applicant. The court must therefore grant the applicant's request for postconviction relief.

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[1] Exhibit 2-2 submitted by the State includes the DOC Policies & Procedures effective in December, 2014. The discipline in this case occurred prior to that. As a result, Exhibit 2-2 would not show the policies and procedures applicable to this case. Because of the court hearing several disciplinary proceedings on May 24, 2016, the court had available to it the actual Policies & Procedures in effect in June of 2014. The Policies & Procedures concerning the use of confidential information are identical in the two Policies & Procedures.

ORDER

IT IS THEREFORE ORDERED that the Applicant's Application for Postconviction Relief is granted.

IT IS FURTHER ORDERED that the discipline records of the Applicant shall reflect that he was not found to have violated the rules as identified in the disciplinary notice issued on June 4, 2014. The Applicant has already served the disciplinary detention. As a result, that sanction cannot be removed.

IT IS FURTHER ORDERED that the costs of this matter are assessed to the State.

Dated this 31st day of August, 2016.

/s/ Mary Ann Brown
Mary Ann Brown
Judge, Eighth Judicial District of Iowa