IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHAN COLE,

Plaintiff,

v.

JON E. LITSCHER;
MICHAEL CATALANO;
PRISON HEALTH SERVICES, INC.;
PAM BARTELS; JOHN W. KUSSMAUL;
DANE ESSER; JOSH FUERSTENBURG;
KEITH JANTZEN; TIM F. HAINES;
SHIRLEY OLSON; KERRY MELBY;
BECKY MANNING; and GERALD A. BERGE,

Defendants.

OPINION AND ORDER

04-C-116-C

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This is a civil action in which plaintiff Jonathan Cole seeks monetary, declaratory and injunctive relief against defendants for actions taken by defendants that allegedly violated his rights as a state prisoner under 42 U.S.C. § 1983. It was filed in July 2002 in the United States District Court for the Eastern District of Wisconsin. Through its long and tortured history, it has been whittled down to 18 claims against 13 defendants. Now before the court is the motion for summary judgment of defendants Jon Litscher, Gerald Berge,

Dane Esser, Josh Fuerstenburg, Tim Haines, John Kussmaul and Keith Jantzen. Jurisdiction is present. 28 U.S.C. § 1331.

This motion involves 14 of the 18 remaining claims.[1] They are as follows:

(1-3) Defendants Esser and Fuerstenberg retaliated against plaintiff for filing inmate complaints by

(1) threatening him with having to eat "seg loaf";

(2) issuing him a conduct report and placing him on a "restrictive continuum" for ten days;

(3) requiring him to sit on the floor without clothes when his cell was opened;

(4-6) Defendant Kussmaul retaliated against plaintiff for filing inmate complaints by

(4) ordering that he be placed in a cell containing toxic fumes;

(5) transferring him from the "Alpha Unit" to the "Echo Unit" where plaintiff believed he was unsafe because of toxic fumes;

(6) requiring him to wear ankle cuffs that were too small and cut his legs;

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[1]Defendants Michael Catalano, Pam Bartels, Shirley Olson and Prison Health Services, Inc. filed a separate motion for summary judgment on January 31, 2005. Briefing on this motion is not yet complete.

(7) Defendant Berge and Litscher had a policy that deprived plaintiff of a prayer rug, prayer cap and a cross in violation of the First Amendment free exercise clause;

(8) On April 14, 2002, defendant Jantzen prevented plaintiff from sending a brief to the Wisconsin Court of Appeals and Attorney General in violation of the First Amendment by denying plaintiff's request for legal loan disbursement to cover the cost of postage because "the date on the disbursement [was] wrong";

(9) Defendant Berge's library policy is so restrictive that plaintiff was prevented from filing a timely brief with a Wisconsin state court and as a result, his case was dismissed;

(10) Defendant Haines confiscated legal documents from another inmate who was helping plaintiff litigate two cases in state court; the documents related to plaintiff's two state court actions;

(11) Defendant Berge and Litscher had a policy under which plaintiff was denied food for days at a time for refusing to turn on the lights in his cell;

(12) Defendants Berge and Litscher denied plaintiff access to adequate indoor and outdoor recreation and exercise facilities;

(13) Defendants Berge, Haines and Kussmaul intentionally injured plaintiff by forcing him to wear ankle cuffs that they knew were too tight;

(14) Defendants Berge and Litscher have subjected plaintiff to sleep deprivation by forcing him to live in a constantly illuminated cell and defendant Jantzen subjected plaintiff to sleep deprivation by kicking his door and putting on "high beam lights" in the middle of the night.

I am dismissing plaintiff's claims that defendant Jantzen prevented him from sending a brief to the Wisconsin Court of Appeals and Attorney General in violation of the First Amendment for lack of legal merit. I will grant defendants' motion with respect to all of these claims except plaintiff's claim (#11) that he was denied food for several consecutive days in violation of the Eighth Amendment.

In an order dated October 24, 2005, I stayed a decision as to claims numbered above as 7 and 14 on defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies and gave defendants until November 8, 2004 in which to show that plaintiff had failed to completely exhaust these claims. Defendants have not submitted any additional information. Therefore, I will deny defendants' motion to dismiss as to these claims.

Finally, plaintiff has filed a motion for attendance of incarcerated witnesses at trial. This motion will be denied as premature. Only those inmates who can testify about incidents related to plaintiff's claims that survive defendants' motions for summary judgment will be permitted to testify at trial. Plaintiff will not be able to identify these claims until a

decision is issued on both pending motions for summary judgment.

From the parties' proposed findings of fact, I find the following facts to be material and undisputed except as otherwise indicated.

UNDISPUTED FACTS

A. The Parties

Plaintiff Jonathan Cole is a Wisconsin state inmate who is presently incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Gerald Berge is the warden of the Wisconsin Secure Program Facility. Also employed at the Boscobel facility are defendants Dane Esser and Josh Fuerstenburg as correctional officers, defendant Tim Haines as a unit supervisor of the facility's Echo Unit of the facility and defendants John Kussmaul and Keith Jantzen as sergeants.

B. Retaliation by Defendants Esser and Fuerstenberg

1. Conduct report

The Wisconsin Secure Program Facility employs a rule under which inmates are treated as having refused a meal unless they are standing and have their cells illuminated with high wattage lights when that meal is delivered. On March 29, 2001, defendant Fuerstenburg was delivering meals. When he reached plaintiff's cell, plaintiff had not turned

on his high wattage lights. Even when the high wattage lights are out, cells are illuminated by a five or seven watt light bulb. (The parties dispute whether plaintiff was standing at the time and whether defendant Fuerstenburg gave plaintiff three orders to stand.) Defendant Fuerstenburg treated plaintiff's actions as a meal refusal. Plaintiff filed an inmate complaint (SMCI-2001-10221) about this incident on April 3, 2001.

On April 13, 2004, defendant Esser was retrieving meal trays. His usual practice is to have an inmate pick up the tray and stand under the light in the middle of the room before the trap is opened. Defendant Esser then opens the trap and instructs the inmate to place the tray in the trap. When defendant Esser reached plaintiff's cell, he ordered plaintiff to stand under the light in the center of the room and then pick up his tray. (The parties dispute whether plaintiff failed to comply with this order or defendant Esser's subsequent order that plaintiff step back to the center of his cell after placing the tray in the trap.) Defendant Esser left the tray in plaintiff's cell because of plaintiff's refusal to comply with his orders. Later that evening, plaintiff filed an inmate complaint (SMCI-2001-11433) against defendant Esser, complaining that defendant Esser was imposing requirements exceeding those provided in the inmate handbook.

On April 14, 2001, defendant Fuerstenburg was collecting meal bags. (The parties dispute whether plaintiff was standing or sitting when defendant Fuerstenburg looked into plaintiff's cell.) Defendant Fuerstenburg instructed plaintiff to stand in a particular place

in his cell. (According to defendant, plaintiff was instructed to stand near the door; plaintiff contends that defendant Fuerstenberg ordered him to stand under his light.) Plaintiff refused because the rule handbook he had did not indicate that inmates were required to stand in a specific place when the trap was opened. Defendant Fuerstenberg issued plaintiff a conduct report for disobeying an order.

2. Threat of segregation loaf

Neither defendant Fuerstenberg nor defendant Esser has ever threatened to place plaintiff on a meal tray restriction. However, defendant Esser said to plaintiff, "Well, make sure that you're standing under the light at dinner time tonight or I'm sure defendant Richardson will have no problem letting you sample seg[regation] loaf for ten days."

3. Sitting on floor without clothes

On shower days, inmates are allowed to exchange their dirty clothes for clean clothes. On April 23, 2001, during a clothing exchange, defendants Esser and Fuerstenburg approached plaintiff's cell. At the time, plaintiff was on a back-of-the-cell restriction, which meant that during shower time, plaintiff was required to sit facing the shower wall with his hands placed on the wall while staff completed the clothing exchanges. Defendant Esser and Fuerstenburg ordered plaintiff to sit down and place his hands on the back wall. (The parties

dispute whether defendant Esser and Fuerstenburg also ordered plaintiff to remove the blanket he was wearing.)

C. Placement in cell with unsafe fumes

On October 5, 2000, plaintiff was transferred from the Alpha Unit to the Echo Unit. Upon his arrival at the Echo Unit, defendant Kussmaul directed the officers escorting plaintiff to place him in cell E-425. When the escorting officers walked passed E-425, they smelled a strong amonia-like smell in the cell. Because of the smell, the escorting officers placed plaintiff in a strip cage after which, certain unit staff directed him to cut his fingernails and brought him a pair of fingernail clippers. Because plaintiff refused to cut his fingernails, unit staff issued him a conduct report. (Plaintiff was later returned to the Alpha Unit, although it is not clear whether this was because of the fumes in the cell or because of his refusal to cut his fingernails.) After plaintiff was returned to the Alpha Unit, maintenance staff were called to investigate the odor; they concluded that there was no gas leak in the cell.

D. Ankle cuffs that were too small

On August 28, 2001, plaintiff had an appointment at the health services unit. A security officer placed plaintiff in leg cuffs that cut into the front and back of plaintiff's

ankles. Plaintiff asked defendant Kussmaul to be placed in larger ankle cuffs. In response, defendant Kussmaul told plaintiff that he was free to stay in his cell if he didn't want to wear the smaller cuffs. Plaintiff refused to go and missed the appointment. (Plaintiff's statement in the proposed findings of fact indicate that he went to the appointment and suffered cuts on his fronts and backs of his ankle from the cuffs. However, the portion of his affidavit to which he cites states that he did not go to the appointment and says nothing about suffering any injury. Compare Plt.'s Resp. to Defts.' PFOF, dkt. # 74, ¶ 40, with Plt.'s Aff., dkt. #79, ¶ 74.) Plaintiff complained later to defendants Kussmaul, Haines and Berge about being made to wear ankle cuffs that were too small. Health services unit staff placed plaintiff on a large cuff medical restriction on September 7, 2001.

E. Denial of Prayer Rug, Kufi and Cross

Plaintiff ordered a white kufi and a prayer rug in late March 2001. He had checked the applicable unit rules that allowed for solid or multi-colored religious head coverings. When the kufi and prayer rug arrived, they were rejected because the prayer rug exceeded the 20" x 40" limit and the kufi did not comply with the new policy that all religious head gear be black only.

F. Disbursement Request Denial

Facility staff pick up outgoing inmate mail every day. All disbursement requests are sent to the unit sergeant for approval. These requests may be denied either for lack of funds or for failure to fill out requests properly. There have been instances when inmates back-dated their disbursement requests so that it appears that institution staff are withholding mail or disbursements. On April 17, 2002, defendant Jantzen received a disbursement request from plaintiff dated April 14, 2002. Defendant Jantzen denied the request and instructed plaintiff to put the correct date on future disbursement requests.

G. Law Library

Inmates at the Wisconsin Secure Program Facility have access to either an electronic law library or a book library. Inmates are not allowed to use the electronic law library without first receiving the necessary training. To obtain this training, inmates must submit a request to the law librarian. Inmates who are not trained to use the electronic library are permitted to use the regular library. The materials available at the main law library have been selected by either the law librarian or the education director. The librarian or designee provides inmates with assistance in locating and using appropriate materials. Inmates in segregated confinement have access to starter collections on their unit or to the main law library through electronic means.

H. Food Deprivation

Plaintiff was denied all meals from breakfast on May 12, 2001 through dinner on May 18, 2001 for not turning on his high wattage lights on while meals were being distributed. During this time, plaintiff's weight dropped from 237 to 226 pounds. Plaintiff was denied breakfast and lunch on May 9, 2002, all three meals on May 10, 2002 and all three meals each day between May 24, 2002 and May 29, 2002 because he did not have his lights on when the meals were distributed. After each of these meal denials, plaintiff called the unit sergeant requesting the meal that he had not received. Plaintiff was told that he was not given the meals because he did not have his cell lights on. As a result of the food denials between May 24, 2002 through May 29, 2002, plaintiff experienced a painful bowel movement for which he sought medical attention. Health services unit staff provided laxatives to plaintiff.

I. Exercise Facilities

Inmates are allowed at least five hours of recreation each week. The Wisconsin Secure Program facility does not have an outdoor recreation area, although one is under construction. At the time plaintiff filed this suit, the indoor recreation area had no heating or cooling system and no bathroom. Since then, a hot air supply, a return and an intercom have been installed. A pull-up bar and a push-up bar were added in August 2001. Plaintiff

has lost most of his muscle mass and gained weight in fat since he has been incarcerated at the Secure Program Facility.

J. Sleep Deprivation

1. 24-hour cell illumination

Facility staff check on inmates on several irregular occasions each night to make certain that inmates are present in their cells, not making weapons, attempting escape, engaging in acts of self-harm, damaging their cells or in need of medical or mental health care. In order to perform these nighttime inspections, some form of artificial light is necessary; any incidental light that reaches inside the cells, such as moon light, hallway lights and outside security lights, is insufficient for this purpose. Accordingly, cells are constantly illuminated. There are two sources of light in each cell: general illumination and a "night light." There are switches controlling the general illumination both inside and outside each cell. The night light comes on automatically when the general illumination is off. Between 1999 through most of 2001, the bulb used for the night light was 7 watt and the light was mounted in the center of the ceiling. In late 2001, prison staff began replacing the 7 watt bulbs with 5 watt bulbs as the old ones burned out. The night light in plaintiff's cell provides enough illumination for him to read. The night light fixture has a lense that diffuses the light produced by the bulb. On certain occasions, there is a need for video camera

monitoring; constant cell illumination is needed for video monitoring. Plaintiff suffers from sleep deprivation, tension headaches and eye soreness that he believes have been caused by the constant cell illumination.

One alternative to constant illumination would be the use of flashlights. A bright beam of light flashed directly at each inmate's face on multiple irregular occasions each night might cause some inmates more sleep disruption although several inmates, including plaintiff, believe that they would get better sleep if flashlights were used instead of constant illumination. In addition, flashlights would provide less reliable visibility inside the cell because the cell window would reflect some of the light. Finally, the use of flashlights might enhance conflict between inmates and guards, who would have discretion about how long and how often to shine a light into each cell. Another alternative would be to have officials turn cell lights on and off as they do cell inspections. This alternative has similar drawbacks: changes in light level might cause some inmates more disruption than constant low level illumination, the discretion of prison guards about how often and how long to leave lights on might lead to conflict between prison officials and inmates and camera monitoring would not be possible.

2. Door kicking and use of high wattage lights at night

The parties dispute whether defendant Jantzen ever left on the high wattage lights in

plaintiff's cell for long periods of time or kicked plaintiff's cell door. Defendants deny both; plaintiff contends that defendant Jantzen would turn on the high wattage lights in plaintiff's cell from approximately 11 p.m. through 5 a.m. and kick on plaintiff's cell door on several occasions to punish plaintiff for sleeping in the wrong direction in his bed. Plaintiff alleges that defendant Jantzen engaged in this behavior on May 7 or 8, 2002, May 12, 2002, May 18, 2002, May 19, 2002, May 29, 2002 and on June 29, 2002. According to plaintiff, he was sitting at his desk on at least one of these occasions and awake during several others. Plaintiff contends that the high wattage lights exacerbated the difficulty he had sleeping and even when plaintiff did manage to fall asleep, defendant Jantzen woke him again by kicking on the cell door.

OPINION

A. Retaliation

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). Although it is easy to state a retaliation claim, Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002) (petitioner need not allege a chronology

of events from which retaliation could be plausibly inferred), the burden of proving the claim is heavy, Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996).

To prevail on a retaliation claim, a prisoner must prove that his constitutionally protected conduct was a substantial or motivating factor in a defendant's actions, that is, that the prisoner's protected conducted was one of the reasons a defendant took adverse action against him. Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003); Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977). "Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant . . . to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct." Spiegla v. Hull, 371 F.3d 928, 943 (7th Cir. 2004).

1. Constitutionally protected speech

As the basis for his retaliation claims against defendants Esser and Fuerstenberg, plaintiff has identified two inmate complaints he filed, SMCI-2001-10221 on April 3, 2001 and SMCI-2001-1143 on April 13, 2001. Plaintiff has a constitutionally protected right to complain about prison conditions. Walker v. Thompson, 288 F.3d 1005 (7th Cir. 2002); Babcock v. White, 102 F.3d 267, 276 (7th Cir. 1996) ("federal courts have long recognized a prisoner's right to seek administrative or judicial remedy of conditions of confinement").

Although this right would not extend to grievances of an abusive or threatening nature, see Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986), defendants do not contend that either of plaintiff's inmate complaints are so "[in]consistent with prison discipline" that defendants could punish him for filing them without infringing his constitutional rights. Id.

With respect to plaintiff's claims of retaliation against defendant Kussmaul, plaintiff has not identified any speech, protected or otherwise, that allegedly motivated any of defendant Kussmaul's actions. In his complaint, plaintiff states only that defendant Kussmaul retaliated against him because he filed inmate complaints against him. Amend. Cpt., dkt. #1, vol. 1, at 7, ¶ 31. Although this allegation is arguably sufficient to state a claim at the initial stage of a lawsuit given the liberal pleading requirement of Fed. R. Civ. P. 8(a) and the permissive standard applied to pro se submissions, Haines v. Kerner, 404 U.S. 519, 521 (1972), "[t]he fact that a court allowed him to proceed on his claim does not mean that the court has made a final determination that his activity was protected; additional evidence may reveal reasons why it was not." Johnson, 292 F. Supp. 2d at 1152-53. Aside from the pragmatic difficulties of ascribing defendant Kussmaul's conduct to speech without identifying that speech, it is impossible to determine whether an inmate complaint might qualify as protected speech absent some indication of its content; it is the content of the grievance and not its form that is protected by the First Amendment. See Walker, 288 F.3d at 1009 (reversing lower court's dismissal of retaliation claim for

petitioner's failure to use proper forms). Plaintiff's failure to identify or adduce evidence of the speech underlying his retaliation claims against defendant Kussmaul entitles defendants to summary judgment with respect to those claims. The rest of the retaliation discussion will relate only to defendants Esser and Fuerstenberg.

2. Substantial or motivating factor

"[T]o prove retaliation, a prisoner plaintiff will have to show that plaintiff's protected activity was one of the reasons for the defendant prison officials' decision to take an adverse action against him." Johnson, 292 F. Supp. 2d at 1154. Plaintiff may make this showing by producing direct evidence of retaliation by defendants Esser and Fuerstenburg; direct evidence would include a defendant's comments indicating that he had subjected the plaintiff to adverse treatment because of the protected speech. Id. Plaintiff has not adduced any evidence that might qualify as direct evidence. Instead, he appears to rely on the mere fact that his inmate complaints were filed shortly before the allegedly retaliatory conduct of defendants Esser and Fuerstenberg. Although evidence that the exercise of a protected right was followed closely by adverse treatment may be highly probative, the Court of Appeals for the Seventh Circuit has rejected the notion that mere temporal proximity could be dispositive. Sitar v. Indiana Dept. of Transportation, 344 F.2d 720, 728 (7th Cir. 2003); see also Stone v. City of Indianapolis Public Utilities Division, 281 F.3d 640, 644 (7th Cir.

2002) ("mere temporal proximity between the filing of the charge of discrimination and the action alleged to have been taken in retaliation for that filing will rarely be sufficient in and of itself to create a triable issue"). Because "speculation based on suspicious timing alone [] does not support a reasonable inference of retaliation," Sauzek v. Exxon Coal USA, Inc., 202 F.3d 913, 918 (7th Cir. 2000), and plaintiff has adduced no other evidence, defendants' motion will be granted with respect to plaintiff's retaliation claims.

B. Free Exercise

The First Amendment's free exercise clause applies to plaintiff's claim (#7) that defendants Berge and Litscher had a policy under which he was denied a kufi cap and a prayer rug. As an initial matter, a plaintiff bringing a free exercise claim under the Constitution must show that the exercise of his religion has been substantially burdened. Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). "To show a free exercise violation, the religious adherent . . . has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir. 1987) aff'd sub nom. Hernandez, 490 U.S. 680 (1989). Although plaintiff has not proposed any facts regarding his religion, I will

assume from the nature of his requests that he is Muslim.

Plaintiff's claim is not that he was denied a kufi cap or a prayer rug altogether, but that he was denied a *white* kufi cap or a rug *exceeding the 20" x 40" limit*. I note that it is debatable whether this even states a free exercise claim. See Charles v. Verhagen, 01-C-253-C (W.D. Wis. June 11, 2001) (denying petitioner leave to proceed on claim that inability to choose color of Muslim prayer cap burdens free exercise of religion because of *de minimus* nature of deprivation). In any event, plaintiff neither argues nor proposes facts that his ability to practice his religion is substantially burdened because he must wear a black kufi cap or use a prayer rug 20" x 40" or smaller. Because plaintiff has not made the initial "substantial burden" showing required, his claim ends here. Defendants' motion for summary judgment will be granted on this claim.

C. Disbursement Request Denial

In their motion for summary judgment, defendants identify plaintiff's claim (#8) regarding defendant Jantzen's denial of plaintiff's disbursement request as arising under the First Amendment right of access to the courts. As plaintiff observes in his brief in opposition, however, Judge Adelman denied plaintiff leave to proceed on this claim under an access to the courts theory because plaintiff had not alleged a cognizable injury. Instead, plaintiff was allowed to proceed on the theory that by denying plaintiff's disbursement

request for postage to send a brief to a Wisconsin Court of Appeals, defendant Jantzen may have violated plaintiff's First Amendment right to free speech. Plaintiff asks the court to deny defendants' motion with respect to this claim because defendants failed to address plaintiff's claim under a censorship theory. (Defendants waived their right to file a reply brief.)

Plaintiff's request raises an interesting question about the law of summary judgment. In its seminal case on the initial burden borne by a party moving for summary judgment, the Supreme Court held that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions answers to interrogatories and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Celotex v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). In his concurrence, which provided the "swing vote" in Celotex, Justice White emphasized the idea that the Court's opinion should not be read as eliminating a movant's burden to prove entitlement to summary judgment. Justice White indicated that he agreed that a defendant movant need not submit evidence disproving a plaintiff's claim, "[b]ut the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." Id. at 328 (White, J. concurring).

Although defendants provide an overview of access to the courts law and conclude in summary fashion that "the facts establish that defendant[] Jantzen [] did not violate the plaintiff's right of access to the courts," they do not explain why defendant Jantzen should be entitled to judgment under a censorship theory. Dft.'s Br., dkt. #58, at 9-14. As Judge Adelman's screening order makes clear, the proof needed to establish this claim differs, so entitlement to judgment on one would not necessarily entail entitlement to judgment on the other. Because defendants have failed to explain why they are entitled to judgment as a matter of law, they have not effectively moved for summary judgment on plaintiff's claim against defendant Jantzen.

Nonetheless, the Prison Litigation Reform Act's screening requirement applies at all stages of the lawsuit. 28 U.S.C. § 1915A. Upon further consideration of the allegations underlying this claim, I conclude that plaintiff failed to state a First Amendment censorship claim. Plaintiff alleged that he submitted a money disbursement request on April 14, 2002, requesting legal loan funds to pay for postage to be used to send a brief to a Wisconsin Court of Appeals and to the Wisconsin Attorney General. Four days later, defendant Jantzen denied the request on the grounds that the disbursement request form had been dated incorrectly.

Although courts have recognized that interference with access to postage is tantamount to interference with mail, e.g., Davidson v. Mann, 129 F.3d 700 (2d Cir. 1997)

(prison regulation on access to stamps might implicate inmate free speech rights); Rodgers v. Hawley, case no. 2001 WL 798618, at *3 (6th Cir. June 22, 2001) (denial of postage stamps could interfere with First Amendment rights if it actually prevents inmate from sending mail), the Court of Appeals for the Seventh Circuit has "emphaisze[d] that merely alleging an isolated delay or some other relatively short-term, non content-based disruption" in mail delivery will not support a First Amendment cause of action. Sizemore v. Williford, 829 F.2d 608, 610 (7th Cir. 1987). In granting plaintiff leave to proceed, Judge Adelman emphasized that plaintiff had not made it clear "whether [he] was then forever prevented from sending the brief or whether he could simply reapply for the loan and correct the problem of the date." Order, dkt. #1, vol. 2, at 9. As Judge Adelman correctly suggested, plaintiff's claim would be meritless unless he was "in fact prevented from sending the brief."

It is well established that pro se complaints are to be liberally construed. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, this rule does not require courts to invent allegations that are not suggested in any manner by the complaint. Hamlin v. Vaudenberg, 95 F.3d 580, 583 (7th Cir. 1996) (rule that pro se complaints are to be read liberally does not mean that courts "will fill in all of the blanks in a pro se complaint"); see also Greer v. Board of Education, City of Chicago, Ill., 267 F.3d 723, 727 (7th Cir. 2001) (essence of liberal construction is to give pro se plaintiff a break when he stumbles on technicality - "[h]owever, a lawsuit is not a game of hunt the peanut"); McCormick v. City of Chicago,

230 F.3d 319, 325 (7th Cir. 2000) (dismissal of pro se plaintiff's claim may be appropriate if operative facts are ommitted); cf. Calhoun v. DeTella, 319 F.3d 936, 943 (7th Cir. 2003) ("prayer for 'such other relief" can be *reasonably viewed* as a request for nominal damages") (emphasis added). Here, plaintiff complained of a single, isolated disbursement request denial. He did not suggest that he was prohibited from reapplying with a properly dated request or suggest that defendant Jantzen's reason for denying the request was erroneous, improper or content-based. His allegations do not give notice to defendants that he was challenging a complete block to his ability to send a brief rather than an isolated disbursement request denial that may have caused a few days' delay in shipment. See Zimmerman v. Tribble, 226 F.3d 568, 572 (7th Cir. 2000) (affirming dismissal of claim where allegations of complaint did not suggest pattern of disturbance to mail delivery). Accordingly, I will dismiss plaintiff's claim.

D. Access to Court Claims

Plaintiff's claim against defendant Jantzen was not an access to the courts claim, but he raised this issue in his claims (## 9 and 10) related to defendant Berge's library policies and defendant Haines's confiscation of legal documents of another inmate who was assisting plaintiff. To have standing to bring a claim of denial of access to the courts, a plaintiff must show that he has suffered "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). This

injury must be something "over and above the denial." Walters v. Edgar, 163 F.3d 430, 433-34 (7th Cir. 1998) (citing Lewis, 518 U.S. 343), for as the Court observed in Lewis, there is no independent constitutional right to a law library or legal assistance but only a right of meaningful access to the courts. Lewis, 518 U.S. at 350-51. At a minimum, the plaintiff must show that the "blockage prevented him from litigating a nonfrivolous case." Walters, 163 F.3d at 434.

Plaintiff alleged in his complaint that the library policy and defendant Haines's confiscation of legal materials from another inmate prevented him from making certain state court filings, but he has not substantiated these claims with any evidence. (Plaintiff has not proposed any facts related to these two claims or discussed either in his opposition brief.) "[W]ithout evidence that the defendants prevented him from pursuing a nonfrivolous legal action, [plaintiff] cannot show that his constitutional right [of access to courts] was violated." Tarpley v. Allen County, Indiana, 312 F.3d 895, 899 (7th Cir. 2002). Failure to adduce this kind of evidence warrants entry of summary judgment in favor of defendants. Id.

E. Eighth Amendment

To prevail on a deliberate indifference claim under the Eighth Amendment, a plaintiff must produce evidence that satisfies two elements. First, the danger to the inmate must be

objectively serious. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Sherrod v. Lingle, 223 F.3d 605, 610 (7th Cir. 2000). For the subjective prong, the defendants must have acted with deliberate indifference. Farmer, 511 U.S. at 838. In determining this second element, if the facts show that a risk is so obvious that a jury may reasonably infer actual knowledge on the part of the defendants, the subjective component of the deliberate indifference standard is satisfied. Id. at 842.

1. Food deprivation (claim #11)

The Court of Appeals for the Seventh Circuit has recognized that denying inmates food for extended periods of time may violate the Eighth Amendment. Reed v. McBride, 178 F.3d 849, 853 (7th Cir. 1999). A violation exists when the denials are so frequent that the inmate is not being provided with a "nutritionally adequate" diet. Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996); see also Hutto v. Finney, 437 U.S. 678, 683, 686-87 (1978) (diet consisting of fewer than 1,000 calories each day could violate Eighth Amendment if maintained for substantial time period). This conclusion derives from the well-settled principle that when government "so restrains an individual's liberty that it renders him unable to care for himself," a failure to provide for his basic human needs such as food and medical care would constitute cruel and unusual punishment. Reed, 178 F.3d at 852 (quoting Helling v. McKinney, 509 U.S. 25, 32 (1993)).

This is not the first time that this court has considered the Wisconsin Secure Program Facility's practice of denying inmates meals for failure to comply with an officer's orders or prison rules. In Freeman v. Berge, 03-C-21-C , 2003 WL 23272395 (W.D. Wis. Dec. 17, 2003), I held that summary judgment was not warranted where the inmate plaintiff had presented evidence that he was denied all meals for up to eight consecutive days and several hundred meals at various times over a three-year period. As I noted in that opinion, the question in a food deprivation case is "whether the defendants were deliberately indifferent to a substantial risk of serious harm to the inmate's health or safety[;] in making this determination, 'a court must assess the amount and duration of the deprivation.'" Id. 2003 WL 23272395 at *5 (quoting Reed, 178 F.3d at 853 and citing Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001)).

Plaintiff has submitted evidence showing that in May 2001 he was denied meals for 6 consecutive days and in May 2002, he was denied two meals one day, all three meals the following day and all meals for five consecutive days at the end of the month. A reasonable jury could find that these denials posed a substantial risk of serious harm to his health. Other federal cases have held that food deprivations anywhere from four consecutive meals on up could satisfy the objective prong of the Farmer test. Reed, 178 F.3d at 853 (three to five days' deprivation to already infirm inmate); Simmons v. Cook, 154 F. 3d 805 (8th Cir. 1998) (four consecutive meals); Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078

(5th Cir. 1991) (several days); Beckford v. Portuondo, 151 F. Supp. 2d 204 (N.D.N.Y. 2001) (denial two out of three meals each day for eight days); Williams v. Coughlin, 875 F. Supp. 1004 (W.D.N.Y. 1995) (two days); see also Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002) (nutritionally inadequate food for two weeks); Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000) (no "edible" food and "adequate" water for four days).

As for the subjective prong, I understand defendants to raise two arguments: (1) an inmate's failure to comply with the rule that he must be standing in the middle of their cell with both pants and lights on is not a "denial" but a "refusal"; and (2) the requirement that inmates be standing and have their lights on protects the safety of officers distributing the meals who need to see the inmate before opening the trap. (Defendants did not actually articulate these arguments in the two pages of their brief collectively responding to all four of plaintiff's Eighth Amendment claims. Instead, I have drwn these arguments from their proposed findings of fact nos. 20 and 22. Dfts.' PFOF, dkt. #59, at 4-5, ¶¶ 20 and 22 (facility policy provides that inmates who fail to stand in middle of cell with lights on are considered to have refused a meal and officers need clear view of inmates before opening trap for safety reasons). To the extent that the statement does not reflect the arguments defendants intended to rely on accurately, defendants have little room to complain.)

Defendants' first argument is a matter of semantics over substance. However it is phrased, plaintiff was not given meals when he did not stand in the middle of the room with

the lights on. Acts may constitute "punishment" for Eighth Amendment purposes even if they are not undertaken with punitive purpose. Hart v. Sheahan, 396 F.3d 887, 892 (7th Cir. 2005). Of course, as I noted in Freeman, 2003 WL 23272395, at *7, "[t]here is an instinctive appeal to the view that the Eighth Amendment simply does not apply to a case of food deprivation when the inmate himself 'carries the keys to the cupboard.' It is difficult to conjure up sympathy for someone who is at least partly responsible for his own predicament." However, as I also observed, adopting the defendants' theory that an Eighth Amendment violation will not lie whenever an inmate can avoid the treatment by altering his own conduct would require concluding "that prison officials may disregard a substantial risk to an inmate's health so long as the reason for doing so is the inmate's failure to comply with prison rules." Id. 2003 WL 23272395, at *7. Essentially, defendants would have the court adopt the idea that punishment is not cruel and unusual so long as it is truly punishment. If it would be cruel and unusual to punish a prisoner for the underlying offense for which he is being incarcerated by denying him food for long periods of time, it follows that extensive periods of food deprivation is an impermissible response to a rule violation as innocuous as failing to turn on a brighter light. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (punishment is cruel and unusual when "grossly disproportionate to the severity of the crime"); Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir. 2001) ("forms of punishment that are permitted for serious crimes may violate the [Eighth Amendment] if imposed for

trivial ones").

Defendants' second argument fares no better. Of course, it would not be an Eighth Amendment violation for a corrections officer to withhold food from an inmate when the inmate's conduct compromises the officer's ability to deliver that food safely. Id.; Pearson v. Ramos, 237 F.3d 881 (7th Cir. 2001). I do not doubt defendants' assertion that officers have a safety interest in being able to see inmates before opening the cell door trap. However, it is undisputed that switches controlling the high wattage lights are located both inside and outside each cell. Further, it appears from plaintiff's proposed facts regarding defendant Jantzen leaving the high wattage lights on in plaintiff's cell that the officer's switch outside the cell overrides an inmate's interior switch. Although I am mindful that prison officials are to be accorded substantial deference for their decisions related to the difficult task of prison administration, I find it hard to believe that requiring inmates to have their cell lights on is necessary to protect officers if the threat can be ameliorated with a literal flip of a switch.

In short, defendants have put forth no evidence or argument undermining the inference of deliberate indifference that can be drawn from the fact that the policy appears to have no limits that would prevent it from being applied so often as to present a substantial risk of harm to an inmate's health. It follows from plaintiff's evidence that he was denied all meals for five days in a row that the limitless nature of the policy can pose a

serious threat to inmate health. Accordingly, their motion for summary judgment will be denied with respect to this claim.

2. Recreation and exercise facilities

Plaintiff's next claim (#12) is that defendants Berge and Litscher denied him access to adequate indoor and outdoor recreation and exercise facilities. The Court of Appeals for the Seventh Circuit has recognized that a denial of adequate opportunity to exercise may violate the Eighth Amendment. Antonelli, 81 F.3d at 1432; French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1986); Harris v. Flemming, 839 F.2d 1232, 1236 (7th Cir. 1988). However, a constitutional violation occurs only "in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened." Antonelli, 81 F.3d at 1432. Opportunities to exercise that are merely less than desirable do not implicate this constitutional right. See generally Caldwell v. Miller, 790 F2d 589, 601 (7th Cir. 1986) ("Constitution does not mandate that prisons be comfortable"); e.g., Harris, 839 F.2d at 1236 (no violation where petitioner could have moved about his segregation cell by doing push-ups, aerobics or jogging in place).

Plaintiff's sole evidence is that the exercise room reflected the outdoor temperature and did not have a bathroom. He has adduced no evidence that the exercise area was so hot or so cold that he was unable to utilize it or that he could not use the toilet facilities in his

cell before and after exercising. Because exercise generates body heat and Wisconsin summers do not get particularly hot, plaintiff would have had an opportunity to exercise most days of the year. "[S]hort-term denials of exercise may be inevitable in the prison context and are not so detrimental as to constitute a constitutional deprivation." Delaney v. DeTella, 256 F.3d 679, 684 (7th Cir. 2001). Plaintiff's choice to forgo the opportunities available to him does not render the conditions constitutionally inadequate. Because plaintiff has not shown that he was denied meaningful opportunity to exercise, defendants' motion will be granted with respect to this claim.

3. Tight ankle cuffs (claim #13)

Plaintiff has failed to adduce evidence that he was actually placed in ankle cuffs that were too small. (Plaintiff's affidavit does not support the statement plaintiff made in the proposed findings of fact about having been placed in ankle cuffs that cut into the front and backs of his ankle.) According to the undisputed facts, plaintiff decided against going to his appointment at the health services unit because he did not want to wear standard sized ankle cuffs. Even if plaintiff had supported the version of events he described in the proposed findings of fact with admissible evidence, the force he contends was used against him is not of constitutional magnitude. In Fillmore v. Page, 358 F.3d 496 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit rejected an inmate's claim that his Eighth Amendment

rights were violated when prison guards "held a baton with one end on top of the chain portion of the handcuffs between [plaintiff's] wrists and the other between his legs [thereby] apply[ing] continuous downward pressure on [plaintiff's] wrists, and continuous upward pressure on his groin." The court reasoned that this type of *de minimus* use of force is not "'repugnant to the conscience of mankind'" and therefore, not a violation of the Eighth Amendment violation. Id. at 504 (citing Hudson v. McMillian, 503 U.S. 1, 10 (1992)). Being placed in ankle cuffs one size too small is similarly *de minimus*. Further, the extent of the injury suffered is highly relevant, although not determinative, in determining whether force is wanton and unnecessary. Hudson, 503 U.S. at 7. Plaintiff suffered only relatively minor injuries, namely cuts to the fronts and backs of his ankles. E.g., Williams v. Evers, 01-C-241-C (W.D. Wis. June 10, 2002) (minor swelling and slight laceration of wrists caused by handcuffs suggests force used was not excessive). Thus, plaintiff's claim would have failed even if he had submitted evidentiary support for the statements he made in the proposed factual findings.

4. Sleep deprivation (claim #14)

a. Twenty-four hour cell illumination

Constant illumination may violate the Eighth Amendment if it causes sleep deprivation or leads to other serious physical or mental health problems. Keenan v. Hall,

83 F.3d 1083, 1091 (9th Cir. 1996) (24-hour illumination by fluorescent lights not dimmed at night). However, in another lawsuit brought by an inmate challenging the Wisconsin Secure Program Facility's constant illumination, Pozo v. Hompe, No. 02-C-12-C (W.D. Wis. April 8, 2003), defendants put in evidence to prove that during 1999, 2000 and most of 2001, the nightlight at the facility consisted of a 7- watt, twin tube fluorescent light mounted in the center of the ceiling; that near the end of 2001, prison officials began replacing the 7-watt bulbs with 5-watt bulbs; and that now all bulbs are 5 watts. I concluded that by itself, such constant low-light illumination does not constitute cruel and unusual punishment in violation of the Eighth Amendment.

Of course, in Pozo, I noted that the plaintiff had not suggested that there were better alternatives to achieve the same penological goals. "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." Turner v. Safley, 482 U.S. 78, 91 (1987). Plaintiff contends that he and several other inmates would be able to sleep much better if the prison were to adopt the practice of either using flashlights or turning on the lights only when they made their cell inspections. However, defendants contend that both of these proposed alternatives have multiple drawbacks. One problem is that neither alternative would permit video monitoring. Another is that many inmates might find sudden changes

in lighting, particularly direct flashlight beams, to be more disruptive to their sleep than steady 5-watt illumination. Finally, these alternatives pose a potential problem of escalating tension between prison officials and inmates because of the discretion that guards would have in determining how long and how often to turn the lights on or use a flashlight.

Plaintiff may disagree with these explanations, but a court is required to give considerable deference to prison officials' adoption of policies that serve security interests and may "not substitute [its] judgment for [prison officials'] 'in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations.'" Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)). I can find nothing in the record of this case to suggest that defendants are exaggerating their response to the concerns at issue here.

Moreover, in Warren v. Litscher, No. 02-C-0093-C (W.D. Wis. Dec. 4, 2002), I concluded that defendants were entitled to qualified immunity on plaintiff's claim for money damages for alleged sleep deprivation allegedly caused by constant illumination because the plaintiff had failed to show a clearly established constitutional right to be free from constant illumination. Finally, plaintiff cannot obtain injunctive or declaratory relief against defendant Berge on this claim; any such relief is barred by the settlement agreement approved in Jones 'El v. Berge, 00-C-0421-C (W.D. Wis. Mar. 28, 2002). As a member of the class, plaintiff is bound by the agreement that accepts cell illumination limited to 5 watt

light bulbs. See Horton v. Berge, 02-C-470-C (W.D. Wis. Mar. 12, 2003). Because defendants have proved a legitimate penological justification for their policy of constant cell illumination by a 5 or 7 watt bulb and because plaintiff could not obtain any form of relief for his claim, defendants' motion will be granted with respect to plaintiff's claim as it relates to constant illumination.

b. Door kicking and high wattage lights at night

Although there is a dispute of fact whether defendant Jantzen kicked plaintiff's cell door or left the high wattage lights on in his cell overnight, plaintiff's versions of events do not show an Eighth Amendment violation even if they are accepted in full. Plaintiff contends that defendant Jantzen kicked his cell door and left on the high wattage lights in his cell on six nights over the course of two months but admits that he was able to fall back asleep after at least some of these incidents and was already awake and sitting at his desk on another occasion. In order to show that a condition of confinement is sufficiently serious, the deprivation must be "extreme"; mere discomfort is not sufficient. Hudson, 503 U.S. at 8-9; see also Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (conditions that deprive inmates of "minimal civilized measure of life's necessities may constitute cruel and unusual punishment but conditions that are restrictive and even harsh "are part of the penalty that criminal offenders pay for their offenses against society"); Adams v. Pate, 445 F.2d 105, 108-

09 (7th Cir. 1971) (conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" do not establish an Eighth Amendment violation). The length of time that a prisoner is subject to a condition of confinement is important to determining whether the condition is unconstitutional. Hutto v. Finney, 437 U.S. 678, 686-87 (1978) ("A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months.").

Although I do not condone rude and insensitive behavior of prison officials, six nights of interrupted sleep over the course of two months is not a significant departure from the harsh conditions of normal prison life. Compare Lunsford v. Bennett, 17 F.3d 1574, 1580 (7th Cir. 1994) (subjecting inmates to periodic loud noises over intercom for three consecutive days not Eighth Amendment violation), with Antonelli, 81 F.3d at 1433 (allegations of noise interrupting or preventing sleep every night and often all night sufficient to state Eighth Amendment claim). Plaintiff's evidence of isolated instances of sleep disruption do not show the kind of extreme deprivation necessary to make out an Eighth Amendment violation. Accordingly, I will grant defendants' motion with respect to this claim.

ORDER

IT IS ORDERED that

1. The stay imposed on portions of the motion to dismiss for failure to exhaust filed by defendants Jon Litscher, Gerald Berge, Dane Esser, Josh Fuerstenburg, Tim Haines, John Kussmaul and Keith Jantzen is LIFTED and the motion is DENIED.

2. The motion for summary judgment of defendants Jon Litscher, Gerald Berge, Dane Esser, Josh Fuerstenburg, Tim Haines, John Kussmaul and Keith Jantzen is GRANTED with respect to the claims of plaintiff Jonathan P. Cole that

Defendants Esser and Fuerstenberg retaliated against plaintiff for filing inmate complaints by

(1) threatening him with having to eat "seg loaf";

(2) issuing him a conduct report and placing him on a "restrictive continuum" for ten days;

(3) requiring him to sit on the floor without clothes;

Defendant Kussmaul retaliated against plaintiff for filing complaints by

(4) ordering that he be placed in a cell containing toxic fumes;

(5) transferring him from the "Alpha Unit" to the "Echo Unit" where plaintiff believed he was unsafe because of toxic fumes;

(6) requiring him to wear ankle cuffs that were too small;

(7) Defendant Berge and Litscher had a policy that deprived plaintiff of a prayer rug, prayer cap and a cross in violation of the First Amendment

free exercise clause;

(8) Defendant Berge's library policy is so restrictive that plaintiff was prevented from timely filing a brief with a Wisconsin state court and as a result, his case was dismissed;

(9) Defendant Haines confiscated legal documents from another inmate who was assisting plaintiff litigate two cases in state court; the documents related to plaintiff's two state court actions;

(10) Defendants Berge and Litscher denied plaintiff access to adequate indoor and outdoor recreation and exercise facilities;

(11) Defendants Berge, Haines and Kussmaul injured plaintiff intentionally by forcing him to wear ankle cuffs that they knew were too tight;

(12) Defendants Berge and Litscher subjected plaintiff to sleep deprivation by forcing him to live in a constantly illuminated cell and defendant Jantzen subjected plaintiff to sleep deprivation by kicking his door and putting on "high beam lights" in the middle of the night.

3. Defendants' motion for summary judgment is DENIED with respect to plaintiff's claims that defendant Berge and Litscher had a policy under which plaintiff was denied food for days at a time for refusing to keep his cell lights on.

4. Plaintiff's claim that defendant Jantzen denied plaintiff's request for legal loan

disbursement to cover the cost of postage because the date on the disbursement was wrong is DISMISSED for lack of legal merit.

5. Plaintiff's motion for attendance of incarcerated witnesses who agree to testify voluntarily is DENIED as premature.

Entered this 15th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge