IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RODOSVALDO POZO,

Plaintiff, OPINION AND ORDER

v. 02-C-12-C

BRAD HOMPE, CAPT. BLACKBOURN,
WARDEN GERALD BERGE,
SGT. HUIBRETSE and JON LITSCHER,

Defendants.

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This is a civil suit for injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983 by plaintiff Rodosvaldo Pozo, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Plaintiff is proceeding on claims that 1) his Eighth Amendment rights were violated by defendants Litscher and Berge because he was subjected to extreme cell temperatures, constant illumination with hourly bed checks and lack of exercise; 2) defendant Hompe denied him use of the Holy Bible and the "two texts from God," texts that are necessary for Muslims, and defendant Huibregtse took his grey and black kuffi (prayer cap) and his prayer rug, in violation of his First Amendment right to exercise his religion freely; and 3) defendant Blackbourn and unnamed Doe defendants blocked his outgoing

mail written in Spanish and as a result, he had to quit writing his family. In addition, plaintiff was granted leave to proceed on a claim that former defendant Richardson "destroys" extra mail from friends in violation of his First Amendment right of free expression; and against defendant Berge on his free expression claim for the sole purpose of discovering the identity of Doe defendants, third shift sergeants, who plaintiff alleged were personally involved in restricting his outgoing mail written in Spanish. Plaintiff did not amend his complaint subsequently to identify these Doe defendants. Therefore, plaintiff is proceeding on this claim against defendant Blackbourn only. Because defendant Richardson could not be served with plaintiff's complaint, he was dismissed from the case by order of the court dated April 4, 2002. Therefore, plaintiff's claim that he was denied "extra" mail from friends is also no longer at issue in this case.

The case is before the court on defendants' motion for summary judgment. In their motion, defendants argue that they are entitled to summary judgment

1) on plaintiff's claim against defendants Litscher and Berge that he was subjected to extremely warm cell temperatures, because plaintiff failed to exhaust his administrative remedies on this claim;

2) on plaintiff's claim against defendant Litscher that he was subjected to extremely cold cell temperatures, constant illumination with hourly bed checks and lack of exercise, because Litscher was not personally involved in subjecting plaintiff to these conditions or,

alternatively, because these conditions did not violate the Constitution and, if they did, Litscher is entitled to qualified immunity;

3) on plaintiff's claim against defendant Berge of cold cell temperatures, constant illumination with hourly bed checks and lack of exercise, because the conditions did not violate the Constitution and, if they did, that Berge is entitled to qualified immunity;

4) on plaintiff's claim against defendant Hompe that he was denied religious freedom when he was denied a Holy Bible and "two texts from God," because plaintiff failed to exhaust his administrative remedies on this claim;

5) on plaintiff's claim that defendant Huibregtse violated plaintiff's right to exercise his religion freely by confiscating his kuffi and prayer rug, because Huibregtse was not personally involved in the taking or, alternatively, because the taking did not violate plaintiff's constitutional rights and, if it did, Huibregtse is entitled to qualified immunity on this claim;

6) on plaintiff's claim that defendant Blackbourn violated his right to free expression by preventing him from sending mail to his family written in Spanish, because Blackbourn was not personally involved in the alleged wrongdoing; and

7) on plaintiff's free expression claim against defendant Berge, because Berge was named as a defendant on this claim for the sole purpose of allowing plaintiff to discover the names of unidentified Doe defendants.

I conclude that plaintiff has failed to exhaust his administrative remedies with respect to his claims against defendants Litscher and Berge that he was subjected to extremely warm cell temperatures and against defendant Hompe on his claim that he was denied religious books in violation of his First Amendment right to religious freedom. I conclude also that defendant Litscher is not entitled to summary judgment on the claims against him on the ground that he lacked personal involvement in the complained of conditions, but that both Litscher and Berge are entitled to judgment on the merits of plaintiff's claims against them because plaintiff has not proven that the conditions about which he complains are so onerous as to violate his Eighth Amendment constitutional rights. Because I am finding that defendants Litscher and Berge are entitled to judgment on the merits of plaintiff's Eighth Amendment claim, it is not necessary to decide whether Litscher and Berge would be entitled to qualified immunity.

I conclude that defendant Huibregtse was involved personally in directing the confiscation of plaintiff's prayer rug and kuffi, but that the seizure did not violate plaintiff's constitutional rights. Therefore, it is unnecessary to decide whether defendant Huibregtse is entitled to qualified immunity on plaintiff's claim against him.

Finally, I conclude that defendant Blackbourn is entitled to judgment in his favor on plaintiff's claim that he violated plaintiff's First Amendment right to freedom of expression by interfering with plaintiff's ability to write his family in Spanish, because Blackbourn was

not involved personally in the complained of act. In addition, I conclude that defendant Berge is entitled to judgment on this claim, because he was named for the sole purpose of allowing plaintiff to discover the names of unidentified Doe defendants.

From the facts proposed by the parties, I find that the following material facts are not in dispute.

UNDISPUTED FACTS

A. Parties

Plaintiff Rodosvaldo Pozo is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Brad Hompe is a unit manager, defendant Gary Blackbourn is a security captain, defendant Gerald Berge is the warden and defendant Sgt. Judith Huibretse is a correctional sergeant at the Wisconsin Secure Program Facility. Jon Litscher is the former Secretary of the Department of Corrections.

B. Eighth Amendment Conditions of Confinement

1. Temperatures

a. Hot cell temperatures

Plaintiff filed offender complaint SMCI-2001-22786 dated August 1, 2001, stating that his cell was hot. On August 7, 2001, the deputy warden of the Wisconsin Secure

Program Facility dismissed plaintiff's complaint. Plaintiff did not file an appeal.

Earlier, on October 5, 2000, plaintiff filed an inmate complaint (SMCI-2000-28518) complaining about a number of allegedly illegal conditions at the prison including cell illumination, inadequate ventilation, cold and hot temperatures, recreation and sensory deprivation. The complaint was rejected on October 20, 2000, because it contained more than one issue. Plaintiff's appeal was dismissed as untimely on December 28, 2000.

b. Cold cell temperatures

Sam Nelson is employed by the Department of Corrections as a superintendent of buildings and ground 5 at the prison. He and other prison staff periodically check the temperatures of different cells. The temperature check forms prepared and kept in his department recorded cell temperatures averaging in the 70s during winter and show that the temperatures were never below 66 degrees.

In the prison in which plaintiff was previously incarcerated, he was treated for headaches with medication. Plaintiff has a history of a head injury and of reporting frequent headaches. Plaintiff's medical records do not show that plaintiff ever complained to health service unit staff that cold cell temperatures were causing him headaches or other medical problems.

2. Constant illumination and hourly bed checks

Each cell in the prison is illuminated to facilitate constant monitoring by the prison staff. There are two lighting sources during non-daylight hours. Inmates can control one of the sources with a switch inside the cell and prison staff can control it as well, using a switch outside the cell. Inmates cannot control the night light, which comes on automatically when the other in-cell light source is shut off. During 1999, 2000 and most of 2001, the night light was a 7-watt, twin tube flourescent bulb within a fixture mounted in the center of the ceiling of the cell. Toward the end of 2001, the 7-watt bulbs were replaced gradually with 5-watt bulbs as the 7-watt bulbs burned out. All night lights are now equipped with 5-watt bulbs.

Prison staff need to check on inmates several times each night at unpredictable intervals so that the inmates will not use the time for furthering escape plans, fashioning weapons and engaging in self-harm activities. Also, staff conduct bed checks during the night. Staff wake up inmates when they cannot see their skin because they must be sure that there is a living, breathing inmate in the cell and that the inmate is neither posing a security concern by engaging in harmful conduct nor is in need of emergency medical or mental health care.

Inmates at the Wisconsin Secure Program Facility are allowed to cover their eyes with a towel, washcloth or a T-shirt to enable themselves to sleep. Any inmate who complains

of a medical problem allegedly resulting from the night light may request and receive attention from the prison's health services unit. An inmate who complains of a mental health problem allegedly resulting from the night light may request and receive attention from the prison's clinical services unit.

Plaintiff complained about sleeping difficulties and headaches before he was transferred to the Wisconsin Secure Program Facility. His medical history forms from 1995 and 1992 note that he has had a history of head injuries and frequent or severe headaches. Plaintiff was treated for a headache resulting from sinusitis on May 30, 2001. He was seen on complaints of head pain on June 15, August 10, September 25, and October 6, 2001. In May 2002, he was treated for headaches that he said were provoked after a long day of reading and straining his eyes. Before filing this lawsuit in January 2002, plaintiff had not complained about sleep deprivation or constant headaches because of 24-hour cell illumination. On September 15, 2002, plaintiff requested medical treatment, complaining of a major headache because the staff leaves the light on all day and night for weeks. On February 12 and May 1, 2002, he complained of sleeplessness and received medication.

3. Lack of exercise

Before November 1, 2001, inmates in levels one through five were afforded four hours of out-of-cell time each week. This time could be used either for recreation in an out-of-cell

exercise unit or to utilize the law library. The parties dispute the amount of time inmates in levels one through three have been allowed out of their cells since November 1, 2001.

The out-of-cell exercise areas are long enough to allow inmates to exercise by running. Inmates in level 1 and level 2 exercise alone because of the special security need of the inmates confined in the prison. Daylight enters the exercise area through openings at the top of the wall of the exercise areas, through which an inmate can see to the outside. Fresh air enters exercise areas directly through secured openings in the walls of the exercise areas. The exercise areas are not heated.

Inmates may exercise in their cells. There is sufficient room in the cells for physical activities such as running in place, sit-ups, push-ups and other exercise such as isometrics.

Inmates are not forced to engage in out-of-cell recreation. Before September 2000, prison staff on some units would offer inmates the opportunity for out-of-cell exercise; in other units the inmates would have to request the opportunity. If the inmate did not ask for out-of-cell time, it was not provided and the failure to ask was considered a refusal on his or her multi-purpose log. In Echo unit, the inmate would have had to request the opportunity for out-of-cell time. If plaintiff had requested out-of-cell time for recreation or using the law library while on Echo Unit, he would have been afforded the opportunity for such time.

Plaintiff filed an inmate complaint (SMCI-2000-24882) on August 28, 2000,

complaining that he had not been given the option of recreation for almost one and one-half months. When the inmate complaint examiner contacted the unit manager, he was already aware of the situation and had taken corrective action. On September 1, 2000, the prison deputy warden dismissed the complaint.

Since about September 2000, there has been a consistent policy throughout the prison units. Each inmate is now offered the opportunity for out-of-cell time by the prison staff.

Plaintiff has been confined at the prison since June 2000. In the year 2000, plaintiff refused the opportunity for out-of-cell time on 66 occasions. He also lost ten days of recreation in 2000.

In the year 2001, plaintiff refused the opportunity for out-of-cell time for recreation on a total of 106 occasions. He refused the opportunity for the law library on 6 occasions in 2001. On 22 occasions, he was not eligible for out-of-cell time, including recreation or law library, because of his status at the prison. He accepted out-of-cell time for the law library on one occasion during 2001.

In 2002, plaintiff refused the opportunity for out-of-cell time for recreation on a total of 76 occasions. He refused the opportunity for the law library on one occasion. On 23 occasions, he was not eligible for out-of-cell time, including recreation or law library, because of his status at the prison. He accepted out-of-cell time for the law library on one occasion.

He lost library privileges as the result of a conduct report for the period of October 18, 2002 through October 31, 2002.

Plaintiff's medical records do not show that plaintiff has been treated for medical complaints relating to lack of exercise.

C. First Amendment Free Exercise of Religion

1. Holy Bible and religious texts

Plaintiff did not file an inmate complaint regarding defendant Hompe's refusal to let him use the Holy Bible or "two text books from God."

2. Prayer rug and kuffi

Inmates at the prison are permitted to possess approved religious property associated with their religious preference, subject to inspection to ensure conformity to property regulations on size, color and other features. In the progressive structure, inmates obtain greater privileges and more property in direct relation to demonstrated improvements in attitude and behavior.

Effective April 17, 2001, Internal Management Procedure 6 of the Department of Corrections was revised to add restrictions on kuffi and religious rugs along with other religious items. According to the revised Internal Management Procedure 6, inmates may

possess one prayer rug, no more than 24" x 40", including fringe and single thickness only. Also, inmates are allowed to possess one kuffi, sewn and black only. Before the effective date, a memorandum dated April 9, 2001, announced the revision. Inmates were allowed 30 days to send out or dispose of items that were no longer authorized. They were required to fill out a form to indicate the unauthorized religious property in their possession and how that property should be disposed of. The memorandum warned that unauthorized religious property not sent out after the 30-day period might be destroyed.

Kuffis and prayer rugs are religious items for Islam. Before the internal management procedure was revised on April 17, 2001, plaintiff possessed his kuffi and prayer rug in his cell. After the revision, those items were no longer permitted in cells. Plaintiff did not express his preference as to the disposition of those items during the 30-day period. On July 14, 2001, defendant Huibregtse directed two correctional officers to perform a random cell search of plaintiff's cell. The officers seized plaintiff's kuffi and prayer rug because they did not meet the specifications set forth in Internal Management Procedure 6.

D. First Amendment Free Expression

Inmates at the Wisconsin Security Program Facility may send mail written in another language. However, for security purposes, the mail must be translated before it is sent out of the institution. During the time at issue in this complaint, mail that needed translation

was routed to the shift supervisor. The shift supervisor then forwarded the letter to client services for translation. Before October 2001, the translations were done by Deb Blackbourn, Program Assistant-Confidential, who is no longer employed at the facility. From October 2001 until March 2002, Karen Solomon, a teacher's assistant at the facility, translated Spanish letters into English.

Defendant Gary Blackbourn has been employed at the facility since October 17, 1999. He is a Supervising Officer 2, responsible for the security, custody and control of inmates. He provides direction to Supervising Officer 1s and Officers A, B and Sergeants. He is responsible for security support and liaison services in conjunction with other institution initiatives. He is responsible for developing, implementing, and coordinating health and safety programs, procedures and policies, and complying with affirmative action, federal and state civil rights laws, equal employment opportunity and the Americans with Disabilities Act.

Defendant Gary Blackbourn does not have contact with inmates regarding mail issues. Mail issues and concerns are addressed by the mail room supervisor. Defendant Gary Blackbourn did not prevent Pozo from sending letters to his family written in Spanish.

OPINION

Summary judgment is appropriate when, after both parties have had the opportunity

to submit evidence in support of their respective positions and the court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

A. Eighth Amendment Conditions of Confinement

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because the Eighth Amendment draws its meaning from evolving standards of decency in a maturing

society, there is no fixed standard to determine when conditions are cruel and unusual. Id. at 346. However, conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 108-09 (7th Cir. 1971).

In addition, in order to find a prison official liable under the Eighth Amendment for denying an inmate humane conditions of confinement, plaintiff must establish that the official knows of and disregards an excessive risk to an inmate health or safety. See Farmer v. Brennan, 511 U.S. 825, 837 (1994). In other words, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. Id.

1. Defendant Litscher's supervisory responsibility

Defendant Litscher argues that he had no direct and personal participation in the events about which plaintiff complains because he was unaware of plaintiff's particular situation and not indifferent to it. For a supervisory official to be found liable under §1983, there must be a "causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 761 F.2d 360 at 369 (7th Cir. 1985) (citation omitted); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. l983). An official satisfies the personal responsibility requirement "if she acts or fails to act with a deliberate

or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her discretion or with her knowledge or consent." Smith, 761 F.2d at 369; Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). "The prison official need not believe or intend that the inmate will actually be harmed; rather, he is liable if he consciously ignores a substantial risk to an inmate's safety." Pavlick v. Mifflin, 90 F.3d 205, 208 (7th Cir. 1996).

In support of his contention that he was not involved personally in the alleged deprivation of plaintiff's Eighth Amendment rights, defendant Litscher proposes as a fact that he intended plaintiff no harm by the conditions of confinement at the facility, that he does not personally supervise the confinement of inmates at the facility and that he "has no reason to believe" the conditions at the facility have harmed plaintiff either physically or mentally. These facts are irrelevant to the question whether defendant Litscher knew of the conditions about which plaintiff complains and failed to do anything about them, which is enough to find him personally involved in the alleged wrongdoing plaintiff complains about.

During the time at issue in this lawsuit, defendant Litscher was vigorously defending the class action lawsuit of Jones'El v. Berge, 00-C-421-C, in which plaintiff was a class member. I take judicial notice that the complaint of the class included claims that inmates were suffering from extreme cell temperatures, 24-hour illumination and lack of exercise, in violation of their Eighth Amendment rights. As the secretary of the department, defendant

Litscher had the power to improve or change the conditions at the facility. He cannot argue persuasively that he did not know of and consent to the conditions about which plaintiff complains. His argument that he had "no reason to believe" that the conditions could be held to violate the Eighth Amendment is an argument that should be made in connection with his argument that he is entitled to qualified immunity and not in an attempt to avoid liability for lack of personal involvement. Defendant Litscher is not entitled to summary judgment on the ground that he was not involved personally in denying plaintiff his Eighth Amendment rights.

2. Extreme cell temperatures

Prisoners are entitled to "the minimal civilized measure of life's necessities." Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)). This includes a right to protection from extreme cold, see id. (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment), and extreme heat, see Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). "[C]ourts should examine several factors in assessing claims based on low cell temperature, such as the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as

cold." Dixon, 114 F.3d at 644. When I granted plaintiff leave to proceed on this claim, I cautioned him that he would have to garner evidence of the actual temperature in his cell during the time in question or prove that as a result of the extreme heat or cold he suffered deleterious effects on his health beyond mere discomfort.

a. Hot temperatures

The facts reveal that plaintiff filed offender complaint SMCI-2001-22786, dated August 1, 2001, stating his cell was hot, that the complaint was dismissed on August 6 and that he did not file an appeal. It reveals also that an earlier filed inmate complaint plaintiff filed about hot cell temperatures and other prison conditions (inmate complaint SMCI-2000-28518) was dismissed because it contained more than one issue.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging

the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). Moreover, the court of appeals held that "if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

Wis. Admin. Code § DOC 310.04 details the exhaustion requirement for claims involving prison conditions: "[B]efore an inmate may commence a civil action . . . the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14."

Plaintiff concedes that he did not follow administrative procedures relating to his complaints about hot cell temperatures but argues that he should be considered to have exhausted his administrative remedies as to this claim because he was a class member in Jones 'El v. Berge, case no. 00-C-421-C. He contends that because the claims in Jones 'El

overlapped with his Eighth Amendment claims in this case, exhaustion by one class member should satisfy the requirement that he exhausted his administrative remedies in this case. Plaintiff overlooks the fact that this case is an independent lawsuit for monetary relief and not a class action lawsuit. The reasons for not requiring every member of a class action lawsuit to exhaust his administrative remedies before bringing a case are inapplicable to actions brought by single individuals. Plaintiff's duty to exhaust his administrative remedies is statutory and there is no exception available to him.

Accordingly, because plaintiff did not exhaust his administrative remedies concerning his claim of hot cell temperatures in the manner provided in the regulations for doing so, defendants are entitled to summary judgment dismissing this claim for plaintiff's failure to comply with the exhaustion requirements of 42 U.S.C. § 1997e(a).

b. Cold cell temperatures

The facts reveal that Sam Nelson, a superintendent of buildings at the prison, periodically checks cell temperatures and that during the winter, temperatures in the facility's cells that were tested averaged in the 70s and were never below 66 degrees. Plaintiff has produced no evidence to show how cold the temperatures were in his cell or to show that as a direct result of the cold, he suffered an illness he would not have otherwise suffered. Moreover, plaintiff has supplied no evidence to suggest that he could not warm himself with

clothing or blankets when temperatures fell below 72 degrees.

Although it is undisputed that plaintiff made requests for medical treatment for headaches and loss of sleep, plaintiff has not submitted evidence to show that those symptoms were caused by cold cell temperatures and not by something else. Therefore, I conclude that defendants Litscher and Berge are entitled to judgment in their favor on plaintiff's claim that he was exposed to extremely cold cell temperatures in violation of his Eighth Amendment rights.

3. 24-hour illumination and hourly bed checks

Plaintiff contends that he cannot sleep and that he suffers from major headaches as a result of 24-hour illumination. It is undisputed that during 1999, 2000 and most of 2001, the night light was a 7-watt, twin tube flourescent light within a fixture mounted in the center of the ceiling of the cell. Toward the end of 2001, the 7-watt bulbs were replaced with 5-watt bulbs as the 7-watt bulbs burned out and all have now been changed to 5-watt bulbs. Inmates are allowed to cover their eyes with a towel, washcloth or T-shirt to enable themselves to sleep. If an inmate complains of mental or physical health problems, he may request and receive attention from health and clinical services units at the prison.

Defendants have shown that the 24-hour illumination and hourly bed checks further legitimate penological interests. Prison security officials must observe inmates at all times

at unpredictable intervals in order to prevent inmates from furthering escape plans, fashioning weapons and engaging in activities, including self-mutilation and suicide attempts. Artificial light at night is necessary to insure that inmates are alive and not engaging in behavior dangerous to themselves or others. Any incidental light such as moonlight, hallway light or illumination from outside security lights is insufficient for this purpose.

Plaintiff does not dispute that the lights serve a legitimate penological interest in security. He does not suggest that there are better alternatives to achieve the same penological goals. Instead, he has attempted to show that the lighting causes him serious physical and psychological injury by submitting a document he titles "Dr. Kupors," which appears to be a photocopy of an excerpt from the report of Dr. Kuypers, an expert witness in Jones'El, about the potential effects of a combination of conditions at the facility on prisoners suffering from serious mental illnesses or who are prone to psychiatric decompensation, that is, breakdown or suicide. The excerpt expresses Dr. Kuypers's opinion that the 24-hour lighting in place before the settlement of Jones'El could exacerbate disorientation for persons prone to mental illness and sleep deprivation, which in turn exacerbates psychosis, depression and other forms of mental illness. Plaintiff contends that this excerpt proves that the constant illumination violates his Eighth Amendment rights.

Plaintiff's "evidence" is not admissible in the context of this case, however, because

it is not properly authenticated. Plaintiff does not have personal knowledge of the information in the report and he has not obtained an affidavit from the expert attesting to the truth of the report. Thus, the report is inadmissible hearsay. Even if it were authenticated, it is insufficient to prove that constant low-light illumination, by itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Plaintiff does not suggest that he is seriously mentally ill. He is not proceeding on a claim that a combination of conditions that would not violate his rights if standing alone combine to deprive him of a basic human need. Instead, he contends that the lighting in his cell causes him sleeping difficulties and headaches and that this subjects him to cruel and unusual punishment.

The facts show that plaintiff complained about sleeping difficulties and headaches before he was transferred to the Wisconsin Secure Program Facility, that his medical history forms from 1995 and 1992 noted that he had a history of head injuries and frequent or severe headaches, that he was treated for a headache resulting from sinusitis on May 30, 2001, and that he was seen for complaints of head pain on June 15, August 10, September 25, and October 6, 2001. In May 2002, plaintiff was treated for headaches he said were provoked after a long day of reading and straining his eyes. Before he filed this lawsuit in January 2002, plaintiff had not complained about sleep deprivation or constant headaches because of 24-hour cell illumination. Since filing this lawsuit, plaintiff

complained only once, on September 20, that he had a headache caused by the lights and he has received medication for two complaints of sleeplessness.

Because plaintiff has failed to put in evidence to prove that he is suffering any ill effects beyond mere discomfort resulting from night time illumination from low wattage light and hourly bed checks, no reasonable jury could find that defendants have subjected him to the wanton and unnecessary infliction of pain in violation of his Eighth Amendment rights. Therefore, defendants are entitled to summary judgment on this claim.

4. Lack of exercise

Plaintiff alleges that he has been denied adequate exercise in violation of his Eighth Amendment rights. The Court of Appeals for the Seventh Circuit has recognized that a lack of exercise can rise to a constitutional violation. French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1986). In Davenport v. DeRobertis, 844 F.2d 1310 (7th Cir. 1988), for example, the court of appeals upheld a district court's determination that inmates in segregation had to be given five hours of exercise time each week to satisfy the Eighth Amendment. In Antonielli v. Sheahan, 81 F.3d 1422 (7th Cir. 1996), the court found a viable constitutional claim where the prisoner plaintiff was denied all recreational opportunity for seven weeks. In Jamison-Bey v. Thieret, 867 F.2d 1046 (7th Cir. 1989), the court of appeals declared that although 101 consecutive days of segregation without recreation does not alone violate

Constitution, severe restrictions on exercise may constitute an Eighth Amendment violation. However, in Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988), the court of appeals found no Eighth Amendment violation when an inmate spent four weeks in segregation and was not permitted outside recreation but was allowed to move about his segregation cell and could have exercised by jogging in place, engaging in aerobics or doing push-ups in his cell. In Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986), the court found no deprivation where an inmate was denied exercise for thirty days, but then was allowed one hour a week of indoor exercise for six months.

The facts in this case are insufficient to permit a reasonable jury to find that defendants Berge and Litscher violated plaintiff's Eighth Amendment rights by denying him out-of-cell exercise. Although it is undisputed that plaintiff filed an inmate complaint that he was denied all exercise for approximately six weeks and that inmates were permitted four hours of out-of-cell exercise each week before November 2001, these facts alone do not establish an Eighth Amendment violation.

The five-hour-a-week holding examined in Davenport did not produce a bright line rule. In upholding the district court's injunction, the court of appeals rejected the view that "this is always and everywhere the constitutional minimum." Davenport, 844 F.2d at 1316. Rather, as the court made clear in Antonelli, the fundamental question is whether "movement is denied to the point that the inmate's health is threatened." Antonelli, 81 F.3d

at 1432. Thus, even if plaintiff was confined to his cell for several weeks, he must still prove that his health was threatened by this circumstance.

Plaintiff has failed to adduce any evidence to show that defendants' restrictions on his ability to exercise outside his cell has threatened his health. First, I note that although plaintiff complains that he is "not get[ting] 5 hrs of recreation," it is undisputed that in many instances, he is not going to the exercise area because he refuses to go. The Eighth Amendment does not require defendants to force plaintiff to exercise even when he does not want to.

Plaintiff insists that he chooses not to exercise because the exercise area is "not good whatsoever." The only evidence that plaintiff has offered to support his claim that the exercise area is inadequate to maintain his health is an expert report from Jones'El. As noted earlier, plaintiff's reliance on this report is problematic because the opinions in the report are inadmissible hearsay.

Even assuming, however, that the report is admissible, it does not support plaintiff's argument that the prison's current exercise facilities threaten his health, physical or psychological. See Delaney v. DeTella, 256 F.3d 679, 685 (7th Cir. 2001) ("The defendants also are wrong in concluding that only a showing of physical injury can satisfy an Eighth Amendment claim.") The report concludes that lack of exercise can cause "lethargy and depression (as well as hypertension, diabetes, heart disease and so forth)." No one disputes

that exercise may be generally beneficial to health. But the question in this case is whether the lack of a better exercise facility than the one defendants provide in the prison creates "an excessive risk" to plaintiff's health or safety. Farmer, 511 U.S. at 837. A conclusory assertion that a complete lack of exercise may increase the risk of health problems is not sufficient to show this.

The report also concludes that over 90% of inmates choose not to use the exercise area because it is "unappealing." Specifically, the reports notes that there are no windows in the exercise area, its size is small and it is hot in the summer and cold in the winter. Certainly, there are strong arguments in favor of improving the inmates' exercise opportunities. In fact, under the settlement agreement in Jones'El, defendants Berge and Litscher agreed to make available an outdoor recreation area to inmates on levels 3, 4 and 5. However, the facts show that the exercise area is large enough for plaintiff to run and do calisthenics. Although the exercise area is indoors and lacks exercise equipment, this does not necessarily mean that it violates the Constitution. Plaintiff has adduced no facts showing that the exercise area is so hot or so cold that he is unable to utilize it. At most, plaintiff has shown that his lack of exercise opportunities causes him inconvenience and discomfort. This is insufficient to prove a violation of the Eighth Amendment. Caldwell v. Miller, 790 F.2d 589, 601 (7th Cir. 1986).

B. Free Exercise of Religion

1. Holy Bible and the "Two Texts from God"

Plaintiff contends that defendant Hompe denied his use of the Holy Bible and the "two texts from God," texts that are necessary for Muslims. Defendant Hompe argues that plaintiff is barred from proceeding on this claim because he failed to exhaust his administrative remedies as required in the Prison Litigation Reform Act 24 U.S.C. § 1997e(a).

As noted earlier, an inmate must exhaust his administrative remedies irrespective of the forms of relief sought and offered through administrative avenues. See Booth v. Churner, 532 U.S. 731, 740 (2001). See also Pozo v. McCaughtry, 286 F.3d 1022, 1026 (7th Cir. 2002). The undisputed facts show that plaintiff did not file a complaint regarding defendant Hompe's refusal to let him use the Holy Bible or the "two text books from God."

Plaintiff contends that he filed inmate complaints on this incident and appealed the dismissal but he cannot find evidence of his exhaustion of administrative remedies on this claim because corrections officials searched his cell and took his property. To support this contention, he produced a copy of an inmate complaint (SMCI-2000-30987) in which he alleges that the prison staff have stolen his Spanish complaints.

In previous orders in this case, the court responded to motions filed by plaintiff to compel prison officials to return certain documents allegedly stolen from his cell. Plaintiff's

requests to compel dated March 15, April 29, and July 30, 2002, were denied because he failed to show that he could not re-create any affidavits or exhibits that were relevant and necessary for this case. See July 30, 2000 Order, dkt. #34 at 5. None of these motions referred to documents related to the free exercise claim now at issue. Indeed, plaintiff never indicated to the court that defendants tampered with his evidence to prove exhaustion of administrative remedies, even though he had the opportunity to do so. Therefore, plaintiff's argument that defendants took his evidence in unavailing at this late stage.

I conclude that defendant Hompe is entitled to judgment in his favor on plaintiff's claim that he was denied a Bible and religious texts because plaintiff failed to exhaust his administrative remedies as required under 42 U.S.C. § 1997e(a).

2. Kuffi and prayer rug

Plaintiff contends that defendant Judith Huibregtse violated his constitutional right to freely exercise his religion when she ordered correctional officers to conduct a random search of plaintiff's cell on July 14, 2001, which resulted in confiscation of his grey and black kuffi and his prayer rug.

Defendant Huibregtse argues that she was not directly and personally involved in the seizure or in formulating the prison rules that made plaintiff's prayer cap and rug contraband. However, she does not argue that she was unaware of what constituted

contraband or that her order to perform a random cell search of plaintiff's cell was for a purpose other than identifying contraband and removing it. Under her order, correction officers confiscated plaintiff's kuffi and prayer rug. Although she did not personally seize these items, I find for the purpose of this opinion only that her expressed directive to conduct a random search of plaintiff's cell and implicit directive to seize contraband are enough to implicate her in the alleged unconstitutional act.

Prison administrators are required to provide inmates with a reasonable opportunity to exercise their religious beliefs. Cruz v. Beto, 405 U.S. 319, 322 (1972). A prison regulation does not infringe on an inmate's right to free exercise of religion if it is reasonably related to a legitimate penological goal such as institutional security and the safety of inmates and staff. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

Before considering the reasonableness of the regulation, a preliminary issue is whether plaintiff's free exercise rights have been implicated. "De minimis burdens on the free exercise of religion are not of constitutional dimension." Rapier v. Harris, 172 F.3d 999, 1006 n.4 (7th Cir. 1999); see also Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir. 1987), aff's sub nom. Hernandez v. Commissioner, 490 U.S. 680 (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. . . . This interference must be more than an inconvenience.")

Generally, courts give great deference to an individual's assertion that his or her free exercise rights have been substantially burdened. Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), judgment vacated and remanded by O'Leary v. Mack, 522 U.S. 801 (1997); cf. Dale v. Boy Scouts of America, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the nature of its expressions, we must also give deference to an association's view of what would impair its expression."). In this case, however, defendants have not prohibited plaintiff from wearing a kuffi or possessing a prayer rug; they have only regulated the form those items must take. See Muslim v. Frame, 891 F. Supp. 226 (E.D. Pa. 1995) (whether plaintiff's right of free exercise was substantially burdened by prohibition on wearing kuffis was question of fact for jury). Plaintiff has proposed no facts suggesting that the color of a kuffi or the size of a prayer rug has any religious significance. He also has proposed no facts that black kuffis or smaller prayer rugs are more difficult to obtain than larger prayer rugs or kuffis of different colors.

It is true that plaintiff argues that the limitation does in fact burden *his* free exercise of religion because he cannot afford to purchase a new kuffi and prayer rug. However, plaintiff has proposed no facts and provided no evidence to suggest that kuffis and prayer rugs are prohibitively expensive. Although defendants do not have carte blanche to place any

restrictions on inmates' ability to obtain religious articles, plaintiff cannot create a genuine issue of material fact simply by alleging that it would be difficulty for him to obtain another kuffi and prayer rug.

I conclude that plaintiff has failed to show that the new regulation burdens his right of free exercise of religion. Thus, I need not determine whether the regulation is reasonably related to a legitimate penological interest.

B. Free Expression

Originally, plaintiff was granted leave to proceed against defendants Berge, Blackbourn and Richardson on his claim that these defendants did not allow him to send out letters to his family written in Spanish in violation of his First Amendment right to freedom of expression. As noted earlier, defendant Richardson has been dismissed because plaintiff never served him a copy of the complaint. In this order, I will dismiss plaintiff's free expression claim against defendant Berge, because plaintiff was allowed to proceed against Berge only for the purpose of discovering the identity of unnamed Doe defendants. Plaintiff has not identified any Doe defendants in the time within which he had to do so. Therefore, he can no longer proceed against defendant Berge on this claim.

The remaining issue is whether defendant Blackbourn violated plaintiff's First Amendment right of freedom of speech by preventing him from communicating with his

family in Spanish. Section 1983 creates a cause of action based upon personal liability and predicated upon fault. An individual cannot be held liable in a section 1983 action unless he caused or participated in an alleged constitutional deprivation. McBride v. Soos, 679 F.2d 1223, 1227 (7th Cir. 1982).

The facts show that defendant Blackbourn did not directly and personally prohibit plaintiff from sending out letters in Spanish. As a Supervising Officer 2, defendant Blackbourn is responsible for the security, custody and control of inmates. His responsibility does not involve complaints about the mail. Those are addressed by the mail room supervisor. Defendant Blackbourn does not have contact with inmates regarding mail issues.

Plaintiff attempts to show defendant Blackbourn's involvement by arguing in his brief that Blackbourn sent him three letters threatening him not to write Spanish. However, plaintiff has not produced any evidence of such a threat. Even if he had, mere threats are insufficient to state a claim of constitutional proportion, in and of themselves. See Martin v. Sargent, 780 F.2d 1334 (8th Cir. 1985) (inmate rights not violated by threat that he would have "bad time" if he refused to cut his hair and shave his beard). In the few cases in which threats have be held to be actionable, the threats were either completely unrelated to enforcement of prison regulations or were made while brandishing a weapon. See Burton v. Livingston, 791 F.2d 97(8th Cir. 1986) (prison guard pointed revolver at prisoner, cocked it and told prisoner to run "so I'll be justified"); Douglas v. Marin, 684 F. Supp. 395 (D.N.J.

1988) (staff member's threat to kill prisoner with kitchen knife he was holding; threat was not "off-the-cuff" remark); see also Walsh v. Brewer, 733 F.2d 473, 476 (7th Cir. 1984) (risk to inmate's safety may violate rights when threats are constant and create "reign of terror").

Because plaintiff has failed to produce any evidence that defendant Blackbourn was involved personally in refusing to allow him to send mail to his family written in Spanish or that he threatened plaintiff his letters in Spanish and that such threats amounted to a reign of terror or reasonably made plaintiff fear for his life, no reasonable jury could find for plaintiff on his claim that defendant Blackbourn violated his constitutional rights. Accordingly, defendants' motion for summary judgment will be granted with respect to the claim against defendant Blackbourn.

ORDER

IT IS ORDERED that the motion of defendants Brad Hompe, Capt. Blackbourn,

Gerald Berge, Capt. Richardson, Sgt. Huibretse and Jon Litscher for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 8th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge