IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Plaintiff, OPINION AND ORDER

v. 03-C-0021-C

GERALD BERGE and
JON E. LITSCHER,

Defendants.

- -

This prisoner civil rights action under 42 U.S.C. § 1983 presents two difficult questions. First, do prison officials violate the Eighth Amendment when they deny food to an inmate for several days because he has failed to comply with the rules for meal delivery? Second, at what point do severe cell temperatures become cruel and unusual punishment? Presently before the court are plaintiff Berrell Freeman's and defendants Gerald Berge's and Jon Litscher's motions for summary judgment on both of these issues.

I conclude that there are genuine issues of material fact with respect to plaintiff's claim that his Eighth Amendment rights were violated when he was deprived of food. Although an inmate's failure to comply with prison rules is a relevant consideration in

determining whether a defendant was deliberately indifferent to the inmate's health, I cannot conclude that it insulates a defendant from liability. To rule otherwise would be inconsistent with Supreme Court precedent and holdings of the majority of lower courts and would allow prison officials to withhold food from inmates to the point of death. A reasonable jury could find from the undisputed facts that plaintiff was subjected to a substantial risk of serious harm to his health and that defendant Berge, as the prison's warden, was deliberately indifferent to that risk. Accordingly, both plaintiff's and defendant Berge's motion for summary judgment will be denied with respect to this claim. However, because there is no evidence in the record that defendant Litscher was personally involved in denying food to plaintiff or in enacting the policy under which the deprivation occurred, I will grant Litscher's motion for summary judgment on this claim.

With respect to plaintiff's claim of extreme cell temperatures, I will grant defendants' motion for summary judgment. As discussed more fully below, I find it troubling that defendants took almost no precautions to protect inmates from excessive heat in the summers of 2000 and 2001. However, although it is clear that plaintiff was subjected to uncomfortable conditions, plaintiff has not adduced sufficient evidence to allow a reasonable jury to find that he was subjected to cruel and unusual punishment.

In his brief and in his proposed findings of fact, plaintiff raises additional issues regarding inadequate medical care at the prison and the deprivation of social interaction and

sensory stimulation. In addition, he argues that he has been subjected to atypical and significant hardships in violation of the due process clause. Plaintiff did not allege inadequate medical care in his complaint. Also, in previous orders, I dismissed plaintiff's due process claim under 28 U.S.C. § 1915 because it was legally frivolous and I granted defendants' motion to dismiss plaintiff's social isolation and sensory deprivation claim because defendants were entitled to qualified immunity on that claim. Therefore, I have not considered any evidence or arguments related to those claims or to any claims other than those of food deprivation and extreme cell temperatures.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Berrell Freeman is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, where he has been incarcerated since December 1999. Defendant Gerald Berge has been the warden of the Secure Program Facility since 1999. He is responsible for the overall administration and operation of the prison and is familiar with the security policies in effect there. Defendant Jon Litscher was Secretary of the Wisconsin Department of Corrections until 2003.

A. Food Deprivation

The policies and procedures of the Secure Program Facility are set out in a handbook that is given to all of the inmates. One of these policies regulates the behavior of inmates during meal delivery, as follows. When the meals are about to be delivered, an officer will announce over the public address system that meals will be distributed. Before inmates may receive their meal, they must put on trousers, turn on their light and stand in the middle of their cell in full view of the officer delivering the meal. The purpose of the rule is to prevent inmates from exposing themselves to staff. (If necessary, an officer can turn on the light with a switch outside the cell.) When an inmate fails to comply with any one of these requirements, staff does not give him his meal. Instead, the inmate's behavior is recorded as a "refusal" to accept his meal. If an inmate complies with the rules, he will receive three meals a day.

Plaintiff was denied meals on various occasions in 2000, 2001 and 2002, for failing to comply with the meal delivery requirements. When plaintiff missed meals, he was not monitored by health services staff any more often than usual.

In November 2001, a doctor in the health services unit ordered that plaintiff be given double supper portions until January 31, 2001. In December 2001, the same doctor discontinued plaintiff's double supper portions and ordered that plaintiff be given double lunch portions for the next three months. In January 2002, a nurse in the health services

unit placed plaintiff on a "high protein, high calorie diet" until March 4, 2002. In February 2002, a doctor from the health services unit placed plaintiff on the same diet until April 30, 2002. The special diet was continued until July 2002.

The Department of Corrections has a form titled "Not Eating or Drinking Information" that it provides to inmates to sign. It states:

> Not eating food or drinking fluids may cause short term or long term illness up to and including death.
>
> Not eating or drinking anything may cause death in just a few days.
>
> Drinking fluids and not eating is less dangerous, but can lead to serious illness if continued for days.
>
> Body reactions to starving include: loss of body fluids, dizziness, lightheadedness, weakness, nausea, vomiting, tiredness, sluggishness, irritability, weight loss, low blood sugar, slow heart rate and low blood pressure.
>
> Starving can result in heart damage, kidney damage, and death. Depending on the length of starvation, damage to the heart and kidneys may be permanent.

Plaintiff has suffered from and received medication for depression, sleep disturbances, frequent headaches, ulceration, nausea and acid reflux. In addition, plaintiff's vision has deteriorated since he was transferred to the Secure Program Facility. In July 2001, plaintiff was treated at UW Hospital for pain in his chest. At times, plaintiff has difficulty breathing. He is often forgetful and confused. He has been placed on clinical observation because he attempted suicide and smeared blood, feces and urine all over his cell.

B. Cell Temperatures

1. Summer months

Cells in the Secure Program Facility do not have windows. All of the cells have "boxcar" doors that are constructed of solid metal. Each cell includes vents for exhausting air in the cell and bringing in fresh air. Inmates are not permitted to sleep near the ventilation ducts. During the summer, temperatures in the cells are usually about the same as the outside air temperature. However, during periods of hot weather, cell temperatures may exceed the outside temperature because the prison's concrete walls retain heat. This occurred in August 2001.

During August 2001, plaintiff was housed in the echo unit of the prison. He was not required to engage in any strenuous physical activity. If he wished, plaintiff could spend almost all of his time lying on his bed.

Generally, inmates are allowed to take three ten-minute showers a week. The water coming out of the showers is set at 110 degrees Fahrenheit. In August 2001, defendant Berge began allowing inmates to take an additional shower, but he discontinued this policy because it increased the humidity in the cells. (Showers are located in each of the cells.) At some point, the shower water temperature was reduced to 101 degrees.

Cells also include sinks, which have controls for "hot" and "cold." The hot water is

set at 110 degrees; the cold water temperature is 76 degrees. However, during hot weather, the "cold" water may rise a few degrees. Inmates may drink water from their sink whenever they choose. In addition, inmates may wet a towel or a t-shirt at the sink and wring out the water on themselves. However, plaintiff was not told he could do this until summer 2002.

Neither plaintiff nor any other inmate at the prison was hospitalized because of the heat in August 2001. Staff from the health services unit made "regular" rounds to check on the health of inmates during this time.

According to weekly checks conducted by the prison's superintendent, during 2001, the highest recorded temperature in plaintiff's unit was 91.4 degrees Fahrenheit, which occurred on July 25, 2001. The temperature reached between 85 and 90 degrees during the weeks of June 14, 2001, June 29, 2001, July 18, 2001, August 2, 2001 and August 9, 2001. The recorded temperatures for the remaining weeks during this time period did not exceed 84 degrees. (Neither plaintiff nor defendants submitted records of the temperatures during summer 2000. However, I note that according to records of the National Climatic Data Center, available at http://www.ncdc.noaa.gov,the temperature in Boscobel, Wisconsin, exceeded 90 degrees only once in July and August 2000. The average high temperature for both months was between 82 and 83 degrees. See Del Raine v. Williford, 32 F.3d 1024, 1036 n.4 (7th Cir. 1994) (noting with approval district court's order taking judicial notice of air temperatures of nearest airport for purposes of determining temperatures in the

prison)).

In July 2002, the Wisconsin Department of Corrections issued an internal management procedure titled "Heat Advisory." It provided:

> Heat exhaustion can result when too much time is spent in a very warm environment, resulting in excessive sweating without adequate fluid and electrolyte replacement. This can occur . . . indoors, with or without exercise. There is a high risk that the individual will continue on to a state of heat stroke.
>
> Heat stroke occurs when the body becomes unable to control its temperature. The body's temperature rises rapidly, the sweating mechanism fails and the body is unable to cool down. Body temperatures may rise to 106 degrees F or higher within 10 to 15 minutes. Heatstroke can result from over exposure to direct sunlight, with or without physical activity, or to very high indoor temperatures. It can cause death or permanent disability if emergency treatment is not given.

In addition, the heat advisory recommends that staff take various precautions once the heat index reaches 90 degrees, such as issuing advisories, increasing access to ice and advising inmates to drink more fluids.

Defendant Berge was not involved in the decision to build the prison without air conditioning and he does not have the authority to order that it be installed.

2. Winter months

Inmates frequently complain about the cold in their cells. In October 2000, a prison official saw prisoners walking in their cells with blankets wrapped around them. Inmates were given extra blankets and thermal underwear to alleviate the effects of cold temperatures.

In the winter, members of the prison staff wear sweaters and coats.

Between October 9, 2000, and December 29, 2000, the recorded weekly temperatute checks show that cell temperatures in plaintiff's unit did not fall below 73 degrees. In 2001 and between January 2, 2002, and March 20, 2002, there were no cell temperatures in plaintiff's unit recorded below 71 degrees.

DISPUTED FACTS

The parties dispute how many meals plaintiff has been denied for failing to comply with rules. According to plaintiff, he was denied the following meals: from January 11, 2001, to January 13, 2001, all meals; from April 23, 2001, to April 25, 2001, all meals; from July 6, 2001, to November 3, 2001, 242 meals; from April 5, 2002, to April 6, 2002, all meals; from June 29, 2002, to July 6, 2002, all meals.

According to defendants' records, plaintiff missed 18 meals between July 1, 2002, and July 8, 2002 (out of a total of 24 meals). He received no meals on July 1, July 3, July 5, and July 6, 2002. In addition, defendants have recorded a number of isolated "refusals" throughout 2000, 2001 and 2002.

The parties also dispute whether plaintiff was placed on a special diet because of the adverse effects of being denied food.

OPINION

A. Food Deprivation

Prisoners forfeit many rights when they pass through the jailhouse gate. Shaw v. Murphy, 532 U.S. 223, 229 (2001) ("[S]ome rights are simply inconsistent with the status of a prisoner."). They may not visit with family members whenever they choose, Overton v. Bazzetta, 123 S. Ct. 2162 (2003), read the publications of their choice, Thornburgh v. Abbott, 490 U.S. 401 (1989), or even be free from random searches of their person, Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998). However, despite the necessary restrictions on inmates' freedom, the Eighth Amendment requires that prison officials provide them with humane conditions of confinement, which include the basic necessities of life, such as shelter, clothing, medical care and food. Farmer v. Brennan, 511 U.S. 825, 832 (1994); see also Jones 'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (concluding that social interaction and sensory stimulation are among life's basic necessities). The question in this case is whether defendants satisfied their obligation to provide plaintiff with the basic necessity of food.

Inmates do not have a right to receive the diet of their choice. Carroll v. DeTella, 255 F.3d 470, 472 (7th Cir. 2001); Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994); see also Thompson v. Gibson, 289 F.3d 1218, 1222 (10th Cir. 2002). An occasional missed meal does not violate the Eighth Amendment. Morrison v. Martin, 755 F.Supp. 683, 686

(E.D.N.C.), aff'd 917 F.2d 1302 (4th Cir.1990). However, a failure to provide an inmate with "nutritionally adequate food" will constitute a violation of the Eighth Amendment if it persists for an extended period. Antonelli v. Sheehan, 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).

The question in a food deprivation case is generally the same as in any other case involving conditions of confinement, that is, whether the defendants were deliberately indifferent to a substantial risk of serious harm to the inmate's health or safety. Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001). In making this determination, "a court must assess the amount and duration of the deprivation." Reed v. McBride, 178 F.3d 849, 853 (7th Cir. 1999). "The more basic the particular need, the shorter the time it can be withheld." Hoptowit v. Ray, 682 F.2d 1237, 1259 (9th Cir. 1982).

Plaintiff has presented evidence that he was denied food for three days in January 2001, for three days in April 2001, for two days in April 2002 and for eight days in June and July 2002. In addition, he avers that he was denied 242 meals between July and November 2001. Defendants dispute most of this evidence, but they admit that plaintiff was denied 18 meals between July 1, 2002, and July 8, 2002, and that he received no meals on July 1, July 3, July 5 and July 6.

Viewing the evidence in the light most favorable to plaintiff, I conclude that a reasonable jury could find that he was subjected to a substantial risk of serious harm to his health. In Reed, 178 F.3d at 853, the Court of Appeals for the Seventh Circuit concluded that the district court had erred in granting summary judgment to the defendants on a claim in which the plaintiff presented evidence that he had been denied food for three to five days. Plaintiff's deprivation was comparably serious.

Decisions in other jurisdictions support a conclusion that defendants are not entitled to judgment as a matter of law. See, e.g., Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002) (prisoner stated claim under Eighth Amendment by alleging that he was given nutritionally inadequate food for two weeks); Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000) (reversing grant of summary judgment for defendants on plaintiffs' Eighth Amendment claim when there was evidence in record that plaintiffs had been denied "edible" food and "adequate" water for four days); Simmons v. Cook, 154 F.3d 805 (8th Cir. 1998) (upholding district court's conclusion that denial of four consecutive meals supported Eighth Amendment violation); Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078 (5th Cir. 1991) (prisoner stated claim under Eighth Amendment by alleging that he was denied food for several days); Beckford v. Portuondo, 151 F. Supp. 2d 204 (N.D.N.Y. 2001) (denying defendants' motion for summary judgment on plaintiff's Eighth Amendment claim that he was denied two out of three meals each day for eight days); Williams v. Coughlin, 875 F.

Supp. 1004 (W.D.N.Y. 1995) (denying defendants' summary judgment motion on claim that defendants violated Eighth Amendment by denying plaintiff food for two days).

In one paragraph, defendants advance three arguments in support of their motion for summary judgment on this claim. They argue first that there is no evidence of weight loss. However, it is undisputed that plaintiff was repeatedly placed on special diets of more food and more calories. Although defendants dispute plaintiff's averment that he was placed on these special diets to increase his weight as a result of food deprivation, I must accept plaintiff's version of events on a motion for summary judgment. Butera v. Cottey, 285 F.3d 601, 605 (7th Cir. 2002) (on motion for summary judgment, court must draw all reasonable inferences in favor of the non-moving party).

In any event, whether plaintiff can prove weight loss is an issue of damages, not liability. Defendants point to no authority that makes weight loss the touchstone of an Eighth Amendment food deprivation claim. They do not deny that going without food for several days could subject a prisoner to a substantial risk of serious harm, which is the ultimate question in an Eighth Amendment case. Williams, 875 F. Supp. at 1014 (stating that risk of denying food for two days "might well be regarded as obvious"); Gutierrez v. Peters, 111 F.3d 1364, 1373, 1372 (7th Cir. 1997) (expert testimony on risk of harm not necessary if seriousness of risk would be obvious to lay person). In fact, the department's own forms acknowledge that "not eating . . . can lead to serious illness if continued for days."

At trial, if plaintiff is unable to prove that he suffered a physical injury as a result of his food deprivation, he may not be entitled to compensatory damages, at least for emotional harm. See 42 U.S.C. § 1997e(e). But even if plaintiff proves no physical injury, he may still receive injunctive relief, as well as nominal and punitive damages. Calhoun v. Detella, 319 F.3d 936, 939-42 (7th Cir. 2003); Doe v. Welborn, 110 F.3d 520, 524 n.3 (7th Cir. 1997).

Second, defendants suggest that plaintiff was not at a risk of harm because even when he went without meals for a substantial period of time, "he consistently accepted his snack bag." Dfts.' Br., dkt. # 99, at 5. In support of this allegation, defendants cite an entry in plaintiff's "Behavioral Incident Form," dated July 5, 2002, that states, "[Plaintiff] has been refusing a lot of his meals but accepts his snack bag on a regular basis." Exh. #104, at 76, attached to Aff. of Ellen Ray, dkt. #103. Even assuming this record would fall into the business records exception of the rule against hearsay, I cannot consider this fact as undisputed because defendants did not include it in their proposed findings of fact and plaintiff has not had an opportunity to respond to it. Even if the fact was undisputed, it would not show that defendants are entitled to summary judgment. There is no evidence that the snacks alone would be enough to provide plaintiff with adequate nutrition. Further, the incident form addresses only the deprivation in early July 2002; plaintiff has presented evidence that he was denied food on many other occasions as well.

Finally, defendants note that this case involves a twist because the denial of food was

directly related to plaintiff's own conduct. If plaintiff had complied with the prison rules, he would have received his meals. (Plaintiff has submitted an affidavit from another prisoner, who avers that "brothers" have been denied meals "because the staff passing them out didn't like the way [the prisoners] talked or carried themselves. I personally was denied a meal by an officer because I didn't smile and because he found my frown to be threatening." Aff. of Raynell Morgan, dkt. #63, at ¶4. This affidavit is irrelevant because it concerns the experience of another prisoner. Plaintiff has not adduced any evidence or even alleged that *he* was denied food for any reason other than failing to comply with prison rules.)

There 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. Certainly, prison officials are not constitutionally barred from using food to discipline inmates for rules violations, particularly when the misconduct is related to food delivery. Although some courts have questioned the penological value of using food as a tool for behavior modification, no court has held that doing so is a violation of the Eighth Amendment in all circumstances. For instance, a number of courts have upheld the practice of feeding inmates "nutra-loaf" for misusing their food or even for disciplinary reasons unrelated to food. LeMaire v. Maass, 12 F.3d 1444,

1456 (9th Cir. 1993); Myers v. Milbert, 281 F. Supp. 2d 859, 865 (N.D.W.Va. 2003); Beckford, 151 F. Supp. 2d at 213. Other courts have noted that even denying food for rules violations is a "facially permissible form of punishment." Cooper, 929 F.2d at 1083; see Reed, 178 F.3d at 853 ("This is not to say that withholding of food is a *per se* objective violation of the Constitution.").

However, these cases are readily distinguishable from plaintiff's situation. In none of them was there a question whether the inmate was being subjected to a substantial risk of serious harm. In the nutra-loaf cases, the inmates were given food that was "not particularly appetizing," but nevertheless "exceed[ed] an inmate's minimal daily requirements for calories, protein and vitamins." LeMaire, 12 F.3d at 1455. Similarly, it would not threaten an inmate's health to deny him one meal or only a few meals over a longer period of time. The same cannot be said for repeated denials of food over several days or longer. To accept defendants' argument, I would have to conclude 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. It is one thing to acknowledge that prison officials have a legitimate interest in enforcing compliance with prison rules. It is quite another to conclude that there are no limitations on the enforcement of those rules so long as the prisoner always has a choice to comply.

To begin to see the danger of adopting defendants' suggested approach, one only has

to consider its application in the context of dispensing medication. Inmates with conditions such as asthma, diabetes or HIV/AIDS rely critically on medication to manage their illness. Even one missed dose may have serious consequences on the inmate's health. If a prison strictly enforced behavioral rules for dispensing medication, it would not be long before an inmate was seriously injured. (I note that plaintiff proposes as a fact that the Secure Program Facility *does* enforce the same rules for receiving medication as it does for receiving food. Plt.'s PFOF dkt #56, at ¶¶132, 247. Although defendants do not list delivery of medicine as one of the activities for which the policy is enforced, see Dfts.' PPOF, dkt. #100, at ¶¶64-72, they do not directly dispute plaintiff's proposed fact.)

A heavy reliance on an inmate's choice in rejecting an Eighth Amendment claim soon runs into trouble because the case law is clear that prison officials may be held liable under the Eighth Amendment for an inmate's injury, even when the immediate cause of that injury is the inmate's own actions. For instance, suicide is a choice, but the Court of Appeals for the Seventh Circuit has held repeatedly that prison officials may violate the Eighth Amendment if they are deliberately indifferent to an inmate's risk of harming himself. Matos ex rel. Matos v. O'Sullivan, 335 F.3d 553 (7th Cir. 2003); Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003); Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001); Estate of Novack ex rel. Turbin v. County of Wood, 226 F.3d 525 (7th Cir. 2000). In none of these cases did the court of appeals suggest that courts should apply a different analysis under the

Eighth Amendment when the inmate himself is at least partially at fault for his own injury.

Of course, death is a more serious injury than malnourishment, but defendants do not cite any authority that would support a conclusion that noncompliant prisoners are denied the protection of the Eighth Amendment until they are dead. Rather, in most cases involving the use of food to discipline, courts have asked only whether the inmates were receiving enough nutrition to maintain their health; courts have not suggested the Eighth Amendment analysis should change depending on whether food was denied for rules violations or simply out of malice or neglect. See LeMaire, 12 F.3d at 1456 (stating that only relevant question under Eighth Amendment was whether "prisoners receive food that is adequate to maintain health."); Cooper, 929 F.2d at 1083 (concluding that district court erred in modifying Eighth Amendment standard in case involving denial of food because plaintiff was not fully dressed); Williams, 875 F. Supp. at 1011 (applying standard of deliberate indifference to substantial risk of serious harm in case involving denial of food for inmate's failure to return his meal tray). In a case involving an extended denial of exercise, the Court of Appeals for the Second Circuit stated emphatically that even when an inmate "holds the key to his cell . . . that fact in no way relaxe[s] [this] court's inquiry into the adequacy of the conditions to which [an inmate is] subjected." Williams v. Greifinger, 97 F.3d 699, 705 (2d Cir. 1996) (no qualified immunity on claim that defendants violated Eighth Amendment by depriving prisoner of out-of-cell exercise for 589 days because he

refused to take tuberculosis test).

There is at least one case in which the court applied a different analysis to the denial of food for failure to comply with a rule. In Talib v. Gilley, 138 F.3d 211 (5th Cir. 1998), the plaintiff had been involved in gang–related violence in the prison. Before the plaintiff could be served a meal, prison staff required him to kneel down with his hands behind his back. If the inmate did not comply with this rule, he was denied the meal. This occurred approximately 10 times a month over the course of five months. The plaintiff contended that the deprivation of food violated the Eighth Amendment. In analyzing the inmate's claim, the court of appeals abandoned the standard generally applied in Eighth Amendment cases and replaced it with the test from Turner v. Safley, 482 U.S. 78 (1987), under which the Court asks whether a prison regulation is "reasonably related to legitimate penological interests." The court then concluded that the defendants had a legitimate interest in insuring the safety of prison staff and that requiring the inmate to kneel down was reasonably related to that interest.

The court did not explain its reasons for applying the Turner test. The Supreme Court adopted the Turner test in response to an inmate's First Amendment challenge to a regulation that restricted correspondence between inmates and a Fourteenth Amendment challenge to a restriction on marriage. Since the Court decided Turner, it has applied the same test to challenges involving the free exercise of religion, O'Lone v. Estate of Shabazz,

482 U.S. 342 (1987), free speech, Thornburgh v. Abbott, 490 U.S. 401 (1989), and familial association, Overton v. Bazzetta, 123 S. Ct. 2162 (2003). However, the Court has never applied Turner in cases involving challenges under the Eighth Amendment. Rather, in Eighth Amendment cases challenging a prison's conditions of confinement, the Court has always asked whether the defendant was deliberately indifferent to a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 829 (1994); Helling v. McKinney, 509 U.S. 25 (1993); Wilson v. Seiter, 501 U.S. 294 (1991); Estelle v. Gamble, 429 U.S. 97 (1976). In fact, in Overton, the Court considered both a substantive due process challenge and an Eighth Amendment challenge to a visitation restriction. Although the Court analyzed the substantive due process claim under Turner, when it came to the Eighth Amendment claim, the Court concluded that the regulation was constitutional because it did not "involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur." Overton, 123 S. Ct. at 2170.

The likely reason for the Court's refusal to extend Turner to Eighth Amendment claims is that the test cannot accommodate situations that involve threats to an inmate's health or safety. Under the approach of Talib, prison officials could allow an inmate to die so long as they were enforcing a legitimate rule. I cannot conclude that such a result would be consistent with the "'evolving standards of decency'" or with the "'dignity of man.'" Atkins v. Virginia, 536 U.S. 304, 311-12 (2002) (quoting Trop v. Dulles, 356 U.S. 86

(1958)). Thus, I respectfully disagree with the court's decision in Talib to apply the Turner test in a case involving a challenge under the Eighth Amendment.

This does not mean, however, that in considering whether there has been an Eighth Amendment violation, courts should ignore the reasons that a prisoner suffered a deprivation. An official's reasons for his behavior are always relevant in determining whether he acted with deliberate indifference. Lunsford v. Bennett, 17 F.3d 1574, 1581-82 (7th Cir. 1994). For example, if an inmate was being unsafe to the extent that entering his cell to deliver his meal would pose a risk to the correctional officer, it would not be deliberate indifference but rather common sense to withhold food from the inmate until a safe way to feed him was discovered. Pearson v. Ramos, 237 F.3d 881 (7th Cir. 2001) (defendants did not violate Eighth Amendment by keeping inmate in disciplinary segregation for one year because he "behave[d] like a wild beast whenever he [was] let out of his cell"); see also Hope v. Pelzer, 536 U.S. 730, 738 (2002) (finding deliberate indifference when defendants handcuffed inmate to hitching post for seven hours in hot sun, without bathroom breaks and with little water in part because "[a]ny safety concerns had long since abated by the time petitioner was handcuffed to the hitching post"). Along the same lines, if the inmate was denied food for refusing to comply with an illegitimate order, this would *support* a finding that the defendant had acted without regard for the inmate's health. Cf. Felix v. McCarthy, 939 F.2d 699 (9th Cir. 1991) (holding that officer was not entitled to qualified immunity

on Eighth Amendment claim that he pushed and handcuffed inmate for refusing to comply with order to clean up officer's spit). Thus, the better the defendant's reason for imposing a deprivation, the more difficult it will be for the plaintiff to prove that the defendant was deliberately indifferent to his health or safety.

In this case, defendants have pointed to no evidence in the record suggesting that the rules for receiving meals are necessary to insure the safety of prison staff. Rather, defendants' only justification for the policy is to prevent inmates from exposing themselves to staff. Although this is a legitimate concern, protecting an officer's sensibilities would not necessarily justify starving a prisoner indefinitely. Furthermore, there is no evidence in the record that, when plaintiff continued to "refuse" meal after meal, any member of the staff even *attempted* to find solutions to the problem that would both uphold prison discipline and insure that plaintiff received adequate nutrition. The evidence in the record does not reveal that *any* action was taken or that any action would be taken, beyond the recording of plaintiff's "refusal." The absence of such evidence is particularly disturbing in this case in light of evidence that plaintiff suffered from a variety of physical and psychological problems that could have affected his ability to comply with the rules and heightened the potential harm that food deprivation could cause. See Reed, 178 F.3d at 853 (noting that "the plaintiff was already infirm, and an alleged deprivation of food could possibly have more severe repercussions for him"). (Defendants object to plaintiff's averments regarding mental

illness. Although I agree that plaintiff is not qualified to diagnose himself as mentally ill, it is preposterous to argue that plaintiff cannot testify to whether he tried to commit suicide or smeared blood, feces and urine all over his cell.) Thus, on the current record, I cannot conclude as a matter of law that the continued denial of food was consistent with the requirements of the Eighth Amendment.

Plaintiff did not name as defendants the officers who denied his meals and he points to no evidence in the record that either defendant Berge or defendant Litscher knew that officers were denying meals to him. A supervisory official may not be held liable for a constitutional violation unless he knew about the conduct and facilitated it, approved it, condoned it, or turned a blind eye for fear of what he might see. Morfin v. City of East Chicago, 349 F.3d 989 (7th Cir. 2003). In this case, the officers denying food to plaintiff were enforcing a policy of the Secure Program Facility. As the warden of the prison, defendant Berge is ultimately responsible for the policies that are enforced in the prison. Thus, if the policy is unconstitutional, this would be sufficient to find that defendant Berge condoned or turned a blind eye to the constitutional violation. See Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 615 (7th Cir. 2002); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

On the current record, I cannot conclude that defendant Berge's policy is constitutional because its enforcement seems to have no limits. The policy states only that

inmates will be denied food if they do not put on trousers, turn on their light and stand in the middle of their cell. The record does not indicate that the policy includes any restrictions on how long an inmate may be denied food for rules violations. The undisputed fact that plaintiff received almost no food for a week supports an inference that no such limitation exists. In addition, defendants adduced no evidence that defendant Berge directs his staff to communicate with him or each other or to take any special precautions when an inmate repeatedly "refuses" food, such as additional monitoring by health professionals or attempts to learn why the inmate refuses to comply with orders and how the problem may be addressed safely. If the policy allows prison staff to deny food indefinitely without addressing the resulting threat to the inmates' health, the policy may be unconstitutional because it evinces deliberate indifference to a substantial risk of serious harm to the inmates' health. Even if defendant Berge's own view is that the policy should not be enforced when an inmate's health is threatened, he may still be held liable if he has not instructed his staff on safeguards that should be employed when an inmate continually fails to comply with meal delivery rules. Kitzman-Kelly v. Warner, 203 F.3d 454, 459 (7th Cir. 2000).

Therefore, defendants' motion for summary judgment will be denied with respect to plaintiff's claim that defendant Berge violated plaintiff's Eighth Amendment rights by denying him food over an extended period. However, there is no basis in the record from which a jury could reasonably infer that defendant Litscher was personally involved in

denying plaintiff food. The policy at issue is not one of the Department of Corrections but of the Secure Program Facility only. Accordingly, I will grant defendants' motion for summary judgment on this claim as it applies to defendant Litscher. Furthermore, because there are several material factual issues that are unresolved, I will deny plaintiff's motion for summary judgment as well.

B. Cell Temperatures

Prisoners have a right under the Eighth Amendment to be free from extreme hot and cold temperatures. Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). The same Eighth Amendment standard applies to cell temperatures as to other conditions of confinement: whether the temperatures subject the inmate to a substantial risk of serious harm. Murphy v. Walker, 51 F.3d 714 (7th Cir. 1995). In assessing whether this standard has been satisfied, a court should consider the temperature's severity, its duration, whether the inmate has alternative means to protect himself from the extreme temperatures, the adequacy of these alternatives and whether the inmate must endure other uncomfortable conditions apart from the severe temperature. Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997).

1. Summer months

There are many disconcerting facts about the cell temperatures in the Secure Program Facility during the summer months of 2000 and 2001. Of most note is the apparent lack of effort of defendants to help reduce the heat in the cells or alleviate the effects caused by the heat. Inmates could not take cold showers. (At some point, shower water temperature was reduced from 110 degrees to 101 degrees, but defendants do not identify when this occurred.) Although even a hot shower might provide limited relief, inmates were allowed only three showers a week. They were not given fans or ice or even cold water to drink (the "cold" water temperature from the inmates' sink was at least 76 degrees in the summer). Inmates did have access to drinking water, but defendants have submitted no evidence that staff monitored inmates to make sure they were drinking sufficient fluids to prevent dehydration or even encouraged inmates to do so. Although there was a ventilation system, the air coming in the cell was at least as hot as the outside temperature and sometimes hotter.

Inmates were given no instructions on how to protect themselves from the heat or on how to recognize heat-related symptoms. Although staff from the health services unit would check on inmates, defendants do not indicate how often they did this, if rounds became more frequent during especially hot weather, or even if high risk populations were monitored more closely. Defendants' only attempt to provide relief was to allow the inmates to take additional (hot) showers, which only made matters worse because it raised the humidity in

the prison.

In short, even though the prison had been open since 1999, by summer 2001, defendants still had no policy in effect for protecting inmates from excessively hot weather. (Defendants propose many facts regarding measures they have taken since 2002 to address the effects of hot weather in the summer. However, as I have noted in several previous orders in this case, events that occurred after I approved the settlement agreement in Jones 'El v. Berge, No. 00-C-421-C, on March 28, 2002, are not relevant to plaintiff's claim.) These facts could be sufficient to allow a reasonable jury to find that defendants were deliberately indifferent to plaintiff's health and safety.

However, to prevail on a claim under the Eighth Amendment, plaintiff must do more than prove defendants' subjective state of mind. Rather, he must show also that he was subjected to a substantial risk of serious harm. This is where plaintiff's claim fails. It appears that defendants may benefit from the fortuity that the summers of 2000 and 2001 did not have long periods of excessively hot temperatures. According to defendants' records, the temperature in plaintiff's unit did not exceed 91.4 degrees during summer 2001. Most of the time, defendants' records do not show the heat exceeding 85 degrees.

These records are far from perfect. Defendants' figures do not take into account the humidity, which could increase the heat index. In addition, cell temperatures were recorded only once a week and not necessarily during the hottest time of the day. Defendant did not

submit any records for summer 2000. (However, records from the National Climatic Data Center show only one day in which the air temperature in Boscobel exceeded 90 degrees in July and August 2000. See "Undisputed Facts," supra, at 7.) Nevertheless, these records are the only competent evidence provided by the parties. A court may not deny a motion for summary judgment on the basis of speculation alone. McCoy v. Harrison, 341 F.3d 600, 604 (7th Cir. 2003).

Plaintiff includes many proposed findings of fact based on his affidavit and the affidavits of other inmates that he was often subjected to temperatures greater than 100 degrees. Although plaintiff is certainly qualified to testify regarding how he *felt* when the weather was hot (and plaintiff has submitted virtually no evidence on this point), he is not a climatologist and there is no indication in his affidavits that he or any other prisoner used any equipment to gauge their cell temperatures. Without a basis for a conclusion that the cell temperatures were as hot as plaintiff says they were, I cannot consider this evidence. Even assuming that a lay person is qualified to testify about temperatures, plaintiff has failed nonetheless to adduce any evidence regarding *how long* he believed his cell was hotter than 100 degrees. Short-term exposure to such temperatures would not violate the Eighth Amendment by itself. Compare Wilson v. Seiter, 893 F.2d 861, 864 (6th Cir.1990) (occasional exposure to 95 degree heat did not violate Eighth Amendment), vacated on other grounds, 501 U.S. 294 (1991) with Dixon, 114 F.3d 640 (summary judgment improper on

Eighth Amendment claim when there was evidence that plaintiff was subject to near freezing temperatures over course of four winters).

In his brief, plaintiff also asks the court to consider the facts in Jones 'El v. Berge, No. 00-C-421, in examining his claim. Although some facts that plaintiff would have to prove at trial overlap with those at issue in Jones 'El, plaintiff cannot rely on "facts" surrounding the conditions of confinement in Jones 'El because those facts were not final findings of fact that support a judgment. Instead, they were facts found only for the purpose of the particular rulings at hand. To prove his claims, plaintiff must show that defendant was liable for the conditions that caused him harm. Plaintiff cannot rely on facts found for a limited purpose in Jones 'El.

Current precedent does not draw a clear line between temperatures that are merely uncomfortable and those that are inhumane or unhealthy. Of course, there reaches a point when heat is so excessive that the risk to an inmate's health is obvious. Brock v. Warren County, Tennessee, 713 F. Supp. 2d 238 (E.D. Tenn. 1989) (defendants violated Eighth Amendment when 62-year old inmate died after being exposed to temperatures up to 110 degrees in cell with no ventilation and very high humidity). In this case, however, the available evidence does not suggest that temperatures in plaintiff's unit were that extreme.

In his brief, plaintiff argues that the risk of harm is demonstrated by defendants' internal management procedure, "Heat Advisory," which was issued in July 2002. It warns

that serious injury or death can occur with prolonged exposure to extreme heat. Of course this is true, but it still raises the question, "How hot is too hot?" The heat advisory procedure does not support a conclusion that temperatures of 85 to 90 degrees pose a serious risk of harm to the average person. The procedure does not recommend any preventive action until the heat index reaches 90 degrees. Although even defendants' records show cell temperatures reaching this range, it appears to have been only for a short time.

There is no other evidence in the record that makes up for what the procedure lacks. There is no evidence that plaintiff or anyone else was hospitalized with a heat-related illness or that plaintiff was on psychotropic medications that would make him more vulnerable to heat. Terrance v. Northville Regional Psychiatric Hospital, 286 F.3d 834 (6th Cir. 2002) (reversing denial of summary judgment on Eighth Amendment claim involving inmate on medication that subjected him to increased risk of heat stroke); Jones 'El, 164 F. Supp. 2d at 1100 (noting that heat is more likely to be harmful for those on psychotropic medications). Although plaintiff lists many ailments that he suffered from, none of them is obviously a result of exposure to heat and plaintiff has failed to adduce any evidence that the heat caused him harm. See Pearson, 237 F.3d at 881 (plaintiff had no medical knowledge and therefore could not testify that his tooth fell out because he was not allowed to exercise outside his cell). (Plaintiff submitted the affidavit of one prisoner who averred that some "prisoners" suffered from heat stroke. See Aff. of Jeremy Daubon, dkt. # 61.

However, he did not identify who it was that suffered or how he knew this. Therefore, I cannot consider this affidavit because it fails to meet the requirement of Fed. R. Civ. P. 56 that affidavits set forth "specific facts" and be based on personal knowledge. Watson v. Lithonia Lighting, 304 F.3d 749 (7th Cir. 2001) (affidavit of plaintiff referring to conduct of other employees not admissible when it did not explain how she learned about conduct); Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted."). The drinking water plaintiff received may have been, as he describes it, "tepid at best," Plts' Br., dkt. #105, at 6, but there is no suggestion that the water was insufficient to prevent plaintiff from dehydrating.

Finally, I note that in almost all of the cases finding potential Eighth Amendment violations for excessive heat, there was corresponding evidence of severely deficient ventilation. Kost v. Kozakiewicz, 1 F.3d 176, 188-89 (3d Cir. 1993); Blake v. Hall, 668 F.2d 52 (1st Cir. 1981); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980); Rhem v. Malcom, 507 F.2d 333, 338 (2d Cir. 1974); Caldwell v. District of Colmbia, 201 F. Supp. 2d 27, 36 (D.D.C. 2001); Inmates of Occaquan v. Barry, 717 F. Supp. 854 (D.D.C. 1989); Brock, 713 F. Supp. 2d 239; Tillery v. Owens, 719 F. Supp. 1256, 1271 (W.D.Pa. 1989) ("Insufficient ventilation . . . undermines the health of the inmates and the sanitation of the institution.

. . . Moreover, a lack of ventilation coupled with double-celling increases the likelihood of disease, as well as frustration brought on by uncomfortable temperatures and odors."). In this case, it is undisputed that the facility had a working ventilation system. Although the air coming in was not cool, the air movement should have lessened the risk to plaintiff's health.

In sum, I do not doubt that summer temperatures in plaintiff's cell were uncomfortable. Although the question is a close one, I cannot conclude on the basis of the record that a reasonable jury could find that defendants violated plaintiff's Eighth Amendment rights. Plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted on plaintiff's claim that defendants violated the Eighth Amendment by exposing him to excessive heat. Plaintiff may take some comfort in the knowledge that in Jones 'El v. Berge, No. 00-C-421-C, I recently ordered the defendants to comply with the settlement agreement in that case by installing air conditioning in the Secure Program Facility so that the summer cell temperatures may reach a goal of 80-84 degrees.

2. Winter months

According to defendants' records, the cell temperatures during the winter did not fall below 71 degrees. In challenging the accuracy of these records, plaintiff points to the

undisputed facts that inmates often complain about the cold, that prisoners have been seen in their cells with blankets wrapped around them and that members of the prison staff wear sweaters and coats to work. Even assuming that these facts would be sufficient to put defendants' records in dispute, they would not support a finding that the winter temperatures in plaintiff's cell were so extreme that they subjected him to a substantial risk of serious harm. Plaintiff's evidence does not approach what would be necessary to allow a reasonable jury to find in his favor. Although plaintiff does not need to show that he suffered from "frostbite, hypothermia or similar infliction," Del Raine v. Williford, 32 F.3d 1024, 1035 (7th Cir. 1994), it is not sufficient to merely show that he was uncomfortable. See Dixon, 114 F.3d at 644 ("just because low temperature forces a prisoner to bundle up indoors during winter does not mean that prison conditions violate the Eighth Amendment"); Henderson v. DeRobertis, 940 F.2d 1055 (7th Cir. 1991) (finding that qualified immunity did not apply in case involving cell temperatures below freezing).

Plaintiff's evidence with respect to deliberate indifference is also lacking. It is undisputed that during the winter, inmates were given extra blankets and thermal underwear to alleviate the effects of the cold. This is evidence that defendants were not recklessly disregarding plaintiff's need for warmth. Cf. Wilson v. Seiter, 501 U.S. 294, 304 (1991) (stating that prison officials might violate Eighth Amendment if they subjected inmates to low temperatures *and* failed to give inmates blankets). The record is devoid of any evidence

that the steps defendants took were insufficient or if they were, that defendants knew that more was required to protect the inmates' health. Farmer, 511 U.S. at 837 ("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"). Plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendants violated his Eighth Amendment rights by subjecting him to extreme cold.

ORDER

IT IS ORDERED that

1. Plaintiff Berrell Freeman's motion for summary judgment is DENIED.

2. The motion for summary of defendants Gerald Berge and Jon Litscher is DENIED with respect to plaintiff's claim that defendant Berge violated his Eighth Amendment rights by denying him food for failing to comply with food delivery rules. Defendants' motion for summary judgment is GRANTED in all other respects.

3. Defendant Jon Litscher is DISMISSED from this case.

Entered this 17th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge