IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Plaintiff,

v.

GERALD A. BERGE, PETER HUIBREGTSE, GARY BOUGHTON, JOHN SHARPE and BRAD HOMPE,

Defendants.

OPINION and ORDER

03-C-0021-C

- -

This is a civil action under 42 U.S.C. § 1983 for declaratory, injunctive and monetary relief. Plaintiff, an inmate at the Wisconsin Secure Program Facility, contends that defendants violated his Eighth Amendment protection against cruel and unusual punishment by enforcing a prison policy that resulted in plaintiff's not receiving hundreds of meals over a three to four year period. This case is before the court on defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6). Defendants assert that they are entitled to qualified immunity. Jurisdiction is present. 28 U.S.C. § 1331.

For the reasons stated below, I will deny defendants' motion. In brief, although

prison officials have an unquestionable interest in enforcing rules and procedures, they also have obligations under the Eighth Amendment to provide inmates adequate food and to protect inmates from self-destructive behavior. Plaintiff's allegations establish conduct sufficient to satisfy both the objective and subjective aspects of the Eighth Amendment inquiry. Plaintiff's right to be free from the treatment alleged in his second amended complaint was clearly established by 2000. Thus, at this stage of the litigation, defendants are not entitled to qualified immunity.

For the sole purpose of deciding this motion, I find that plaintiff's second amended complaint alleges the following.

ALLEGATIONS OF FACT

Plaintiff is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Berge is the warden, responsible for the administration and operation of the facility and familiar with the security policies in place at the facility. Defendant Huibregtse is the deputy warden at the facility. He serves as the warden in defendant Berge's absence, supervises unit managers and reviews inmate complaints. Defendant Boughton is employed as the security director at the facility; he is responsible for the facility's security policies and signs off on conduct reports and incident reports. Defendant Sharpe served as a unit manager at the facility at some time in 2002; he now serves as a

captain at the facility. Defendant Hompe served as a unit manager at the facility at all times relevant to this action; presently, he is the deputy warden at the Racine Correctional Institution. Defendants Sharpe and Hompe were responsible for the staff working in the units to which plaintiff was assigned at all times relevant to this lawsuit.

The Secure Program Facility requires inmates to put on pants, turn on the light in their cells and stand in the middle of their cells in full view of corrections officers before receiving meals. The policy is designed to prevent inmates from exposing themselves to officers. If an inmate fails to comply with any one of these requirements, he may not receive his meal. The inmate's failure to comply may be deemed a refusal of the meal.

At various times from 2000-2003, plaintiff was denied meals because of his failure to comply with the facility's policy regarding meal delivery. Plaintiff was denied all meals from April 23-25, 2001. Between July 6, 2001 and November 3, 2001, plaintiff received approximately 121 meals and was denied approximately 242 meals. Plaintiff was refused all meals for at least two consecutive days in January and April 2002. Between June 29, 2002 and July 8, 2002, plaintiff was denied almost all of his meals; for a period of eight days he received no meals at all. Plaintiff was denied four meals over the course of four days in January 2003 and did not receive any meals for three consecutive days in both February and March 2003. From May 18, 2003 to June 5, 2003, plaintiff was denied at least 32 of 57 meals. Plaintiff was denied all meals on September 12-13 and September 22-25, 2003.

Finally, plaintiff was denied at least one meal each day from October 2-12, 2003, and did not receive any meals for eight days during that period. When plaintiff missed meals, he did not receive increased attention from the health services staff.

Under Secure Program Facility procedures, if an inmate refuses or does not consume a meal, "a notation shall be made in the unit's multi-purpose log book." If an inmate goes two consecutive days without eating, the unit sergeant is required to speak with the inmate about why he is not eating. After three days, (1) the unit sergeant must complete an incident report and verbally inform the health services unit, clinical staff and the unit manager; (2) the health services unit must evaluate the inmate; and (3) the unit staff must monitor the inmate's behavior. If an inmate does not eat for at least four consecutive days, the unit sergeant must review the daily meal log and complete incident reports for each denial or refusal.

Officials at the facility keep track of problems with inmates through weekly "Special Needs" meetings. The warden, deputy warden, security coordinator and unit managers attend these meetings along with members of the health services and clinical services departments. An inmate who misses meals continually would be discussed at the "Special Needs" meetings. Defendants Berge and Boughton do not recall ever discussing the denial of meals to plaintiff at a "Special Needs" meeting.

The Department of Corrections has a form titled "Not Eating or Drinking

Information" that it gives inmates to sign. The form 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, acid reflux and chest and muscle pain. He has experienced trouble breathing and vision deterioration since arriving at the Secure Program Facility. He is often confused and forgetful and has been placed on clinical observation for attempting suicide and for smearing blood, urine and feces over his cell.

DISCUSSION

A. Qualified Immunity

The procedures for deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and the analysis of a qualified immunity question are different and often in tension. On a

motion to dismiss under Rule 12(b)(6), a court limits its inquiry to the allegations in the complaint and grants the motion only if, after accepting those allegations as true, it concludes that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In the context of a suit brought under § 1983, a court limits its examination to whether the plaintiff has alleged that a person acting under color of state law deprived him of a federal right. Alvarado v. Litscher, 267 F.3d 648, 651 (7th Cir. 2001) (citing Gomez v. Toledo, 446 U.S. 635, 640 (1980)). The plaintiff's allegations must provide only a short and plain statement of the claim, Fed. R. Civ. P. 8(a), and need not anticipate and plead around affirmative defenses to avoid dismissal. Jacobs v. City of Chicago, 215 F.3d 758, 765 n.3 (7th Cir. 2000) ("the notice pleading requirements of Rule 8 do not require that a plaintiff anticipate the assertion of qualified immunity by the defendant and plead allegations that will defeat that immunity."); cf. Xechem, Inc. v. Bristol-Myers Squibb Co., No. 03-4292, slip op. at 4 (7th Cir. June 23, 2004) ("Complaints need not contain *any* information about defenses and may not be dismissed for that omission.") (emphasis in original).

However, when a defendant bases his motion to dismiss on qualified immunity, the court's inquiry is different. Qualified immunity shields government officials performing discretionary functions from monetary liability as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have

known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." Hope v. Pelzer, 536 U.S. 730, 736 (2002) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). Next, a court must determine "whether the [constitutional] right was clearly established," an inquiry that "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U. S. at 201. Although this inquiry suggests that development of the facts of a case is a prerequisite, the Supreme Court has stated that qualified immunity questions may be presented in a motion to dismiss because qualified immunity is "'an entitlement not to stand trial or face the other burdens of litigation'" and "'an *immunity from suit*'" that is "'effectively lost if a case is erroneously permitted to go to trial.'" Saucier, 533 U.S. at 200-01 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original)). The Court of Appeals for the Seventh Circuit has suggested that qualified immunity should be used sparingly as a ground for dismissal under Rule 12(b)(6). Alvarado, 267 F.3d at 651-52 (quoting Jacobs, 215 F.3d at 775 (Easterbrook, J., concurring) ("Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground for dismissal.")). In Jacobs, the court noted that

> In some cases, a complaint may be dismissed under Rule 12(b)(6) on qualified immunity grounds where the plaintiff asserts the violation of a broad constitutional right that had not been articulated at the time the violation is alleged to have

> occurred. In that case, while the plaintiff may have stated a claim, it is not one 'upon which relief can be granted' and a court may properly address this purely legal question under Rule 12(b)(6) . . . However, in many cases, the existence of qualified immunity will depend on the particular facts of a given case. In those cases, the plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity.

Id. at 765 n.3. With this in mind, I turn to the first prong of the qualified immunity analysis: whether plaintiff's allegations establish a constitutional violation.

1. Constitutional violation

Although "prison conditions may be harsh and uncomfortable without violating the Eighth Amendment's prohibition against cruel and unusual punishment," Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997), prison officials have a duty to insure that inmates receive adequate food, clothing, shelter and medical care. Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001) (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)). Failure to provide an inmate "nutritionally adequate food" may violate the Eighth Amendment if it continues for an extended period. Antonelli v. Sheehan, 81 F.3d 1422, 1432 (7th Cir. 1996).

In determining whether plaintiff's allegations state a claim under the Eighth Amendment, the critical question is whether the allegations show that defendants were deliberately indifferent to a substantial risk of serious harm to the inmate's health or safety.

Sanville, 266 F.3d at 733. This inquiry can be broken down into objective and subjective components. The objective component is whether the alleged deprivation is sufficiently serious. The subjective component deals with the defendants' state of mind and whether the defendants were deliberately indifferent to plaintiff's plight. Delaney v. DeTella, 256 F.3d 679, 683 (7th Cir. 2001).

a. Serious risk of harm

A serious risk of harm to an inmate can arise from denial of "minimal civilized measures of life's necessities." Reed v. McBride, 178 F.3d 849, 852 (7th Cir. 1999) (citing Dixon, 114 F.3d at 640). A court must weigh the amount and duration of any deprivation in determining its seriousness. Reed, 178 F.3d at 853. Several courts have stated that the amount and duration of the deprivation are inversely proportional such that substantial deprivations of food may violate the Eighth Amendment despite relatively short durations. DeSpain v. Uphoff, 264 F.3d 965, 974 (10th Cir. 2001) (citing Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000)). In his second amended complaint, plaintiff alleges that he has been deprived of hundreds of meals over a three to four year period because of his failure to follow the Secure Program Facility's procedure for meal delivery. Plaintiff alleges that he was denied *all* meals for at least two consecutive days in the following months: April 2001, January 2002, April 2002, June and July 2002, January 2003, February 2003, March 2003,

September 2003 and October 2003. Plaintiff alleges that on two occasions, in July 2002 and October 2003, he did not receive a single meal for at least eight consecutive days. During these periods of deprivation, plaintiff alleges, he was not given any increased medical attention despite suffering a myriad of physical and mental problems.

Defendants argue that the Secure Program Facility's meal delivery policy does not violate the Eighth Amendment. I do not understand petitioner's second amended complaint to present a facial challenge to the policy. Rather, as I read the complaint, petitioner is alleging that defendants' implementation of the policy is unconstitutional because its enforcement has resulted in the denial of hundreds of meals on at least a semi-regular basis over several years and for more than a week at a time on two occasions. Plaintiff does not attack the policy on its face, but rather its application to him. Considering that plaintiff alleges denial of hundreds of meals over the course of three to four years, including two periods in which plaintiff did not receive one meal for more than a week straight, I am satisfied that plaintiff's allegations are objectively serious enough to constitute a substantial risk of serious harm to his health. Compare Berry v. Brady, 192 F.3d 504, 506-07 (5th Cir. 1999) (ruling that denial of eight meals over seven month period did not support Eighth Amendment claim) and Talib v. Gilley, 138 F.3d 211 (5th Cir. 1998) (affirming dismissal of claim alleging denial of fifty meals over course of five months) with DeMaio v. Mann, 877 F. Supp. 89, 93 (N.D.N.Y. 1995) (stating that deprivation of food and clothing for twelve

consecutive days would be "'sufficiently serious' to trigger Eighth Amendment concerns") and Moss v. Ward, 450 F. Supp. 591, 596-97 (W.D.N.Y. 1978) (finding Eighth Amendment violation where inmate received no meals for four consecutive days and one meal during each of next three days).

b. Deliberate indifference

To satisfy the subjective prong, an inmate must allege, at a minimum, "*actual* knowledge of *impending* harm *easily* preventable." Delaney, 256 F.3d at 683 (emphasis in original). The Supreme Court has stated that "it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." Farmer, 511 U.S. at 842. In making this determination, I can consider whether "the circumstances suggest that the official being sued had been exposed to information concerning the risk and thus 'must have known' about it." Turner v. Miller, 301 F.3d 599, 603-04 (7th Cir. 2002) (quoting Farmer, 511 U.S. at 842).

Plaintiff alleges that defendant Berge conducts weekly "Special Needs" meetings at which various prison officials meet to discuss problems with specific inmates. Plaintiff alleges that defendants Berge, Huibregtse and Boughton attend the meetings, as do the unit managers. (Defendants Sharpe and Hompe were the unit managers responsible for the units to which plaintiff was assigned during the periods relevant in this case.) Although plaintiff

alleges that defendants Berge and Boughton do not recall any discussion of plaintiff's refusal of meals at a "Special Needs" meeting, it is possible that defendants Berge and Boughton learned of plaintiff's situation through other means. In addition, Secure Program Facility policy requires staff to record each instance of meal refusal in a unit log book and to notify unit managers verbally if an inmate does not eat for three straight days. These allegations suggest that defendants had exposure to information concerning the risk to plaintiff's health and they do not assert that they were unaware of it.

Defendants argue that they did not act with deliberate indifference; plaintiff made the decision to refuse his meals by choosing not to comply with the meal delivery policy. His refusal to comply with the meal delivery policy is the only reason why he missed some meals. In a previous order in this case, I dismissed this argument:

> 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.

Op. & Order, dkt. #129, at 16. Taken to its extreme (but logical) conclusion, defendants' argument would preclude a finding of deliberate indifference even if defendants had allowed plaintiff to starve himself by not complying with meal delivery rules. At some point, defendants' interest in enforcing prison rules must give way to an obligation to prevent an

inmate from committing slow suicide. Although it might suffice to leave it to the inmate to decide whether he wishes to comply with meal delivery rules when the refusals are intermittent or short-term, this hands off attitude cannot continue when the number of meals denied reaches triple digits and the inmate does not receive any meals for eight consecutive days.

It is settled law in this circuit 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 557 (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). An official's reason for his behavior is always relevant in determining whether he acted with deliberate indifference. Lunsford v. Bennett, 17 F.3d 1574, 1581-82 (7th Cir. 1994). Defendants justify the facility's meal delivery rule not as a safety measure but instead as a way to prevent inmates from exposing themselves to prison officials. "Although this is a legitimate concern, protecting an officer's sensibilities would not necessarily justify starving a prisoner indefinitely." Op. & Order, dkt. #129, at 22.

In sum, I have expressed my view on two prior occasions in this case that plaintiff's allegations are sufficient to state a claim under the Eighth Amendment. See Op.& Order, dkt. #129; Order, dkt. #159. Although prison officials are not constitutionally barred from

using food to discipline inmates for misconduct, see Lemaire v. Maass, 12 F.3d 1444, 1455-56 (9th Cir. 1993), even recalcitrant prisoners are entitled to the minimal civilized measure of life's necessities. Farmer, 511 U.S. at 833-34. Courts in other jurisdictions have concluded that inmates state valid Eighth Amendment claims under similar circumstances. See e.g., Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002) (holding that inmate stated claim under Eighth Amendment by alleging that he was given nutritionally inadequate food for two weeks); Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078 (5th Cir. 1991) (ruling that inmate stated claim under Eighth Amendment by alleging denial of food for thirteen days); Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970) (finding valid § 1983 claim where inmate alleged food deprivation for approximately four days). None of the arguments or authority provided by defendants have convinced me that this view is incorrect. Therefore, I must determine whether the right was clearly established at the time of the violation.

2. Clearly established right

The "clearly established" inquiry is conducted in the specific factual context of the case. Saucier, 533 U.S. at 201. In a recent case, the Supreme Court stated that

> For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity

> unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent.'

Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). Plaintiff has the burden of showing that the right in question was clearly established at the time of the violation and may point to "closely analogous cases demonstrating that the conduct is unlawful or demonstrate that the violation is so obvious that a reasonable state actor would know that what he is doing violates the Constitution." McGreal v. Ostrov, 368 F.3d 657, 683 (7th Cir. 2004) (citing Morrell v. Mock, 270 F.3d 1090, 1100 (7th Cir. 2001)). Plaintiff need not produce a case "on all fours" with the present case to meet his burden, Montville v. Lewis, 87 F.3d 900, 902 (7th Cir. 1996); indeed, in Hope, the Supreme Court stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope, 536 U.S. at 741. "The salient question is not whether there is a prior case on all fours with the current claim but whether the state of the law at the relevant time gave the defendants fair warning that their treatment of the plaintiff was unconstitutional." McGreal, 368 F.3d at 683 (internal citations omitted).

Plaintiff alleges that defendants began denying him meals in 2000, so it is at that point that I begin my examination of the law. Before 2000, it was well-settled that inmates have a right under the Eighth Amendment to receive adequate food and other basic

necessities while imprisoned. See Farmer, 511 U.S. at 832-33 (citing cases); Oliver v. Deen, 77 F.3d 156, 159 (7th Cir. 1996); Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996) ("Adequate food is a basic human need protected by the Eighth Amendment"); Woods v. Thieret, 903 F.2d 1080, 1082 (7th Cir. 1990); Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977), modified sub. nom., Alabama v. Pugh, 438 U.S. 781 (1978) ("It is much too late in the day for states and prison authorities to think that they may withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing, shelter, sanitation, and necessary medical attention."). In 1991, the Supreme Court framed the inquiry for a food deprivation claim by stating that "only those deprivations denying 'the minimal civilized measure of life's necessities' . . . are sufficiently grave to form the basis of an Eighth Amendment violation." Wilson v. Seiter, 501 U.S. 294, 298 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). In addition to basic necessities of life, the Court of Appeals for the Seventh Circuit recognizes an inmate's constitutional right "to be protected from self-destructive tendencies." Hall v. Ryan, 957 F.2d 402, 406 (7th Cir. 1992) (inmate suicide) (citing Joseph v. Brierton, 739 F.2d 1244 (7th Cir. 1984)).

Also clearly established prior to 2000 was the fact that disciplinary sanctions used by prison officials to enforce internal rules and procedures are subject to Eighth Amendment scrutiny. See Helling v. McKinney, 509 U.S. 25, 31 (1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are

subject to scrutiny under the Eighth Amendment."). As early as 1968, one circuit court of appeals stated that the protection against cruel and unusual punishment sets limits on internal prison discipline. Jackson v. Bishop, 404 F.2d 571, 580-81 (8th Cir. 1968) ("Neither do we wish to draw . . . any meaningful distinction between punishment by way of sentence statutorily prescribed and punishment imposed for prison disciplinary purposes. It seems to us that the Eighth Amendment's proscription has application to both."); see also Loux v. Rhay, 375 F.2d 55, 60 (9th Cir. 1967) (Hamley, J., dissenting) ("While the matter of state prison discipline is not ordinarily subject to examination in federal courts, the rule is otherwise if the treatment of a prisoner amounts to cruel and unusual punishment within the meaning of the Eighth Amendment"). Courts of appeals, including the Court of Appeals for the Seventh Circuit, continue to recognize explicitly and implicitly that the Eighth Amendment is a check on prison officials' use of disciplinary measures. E.g., Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997) (considering inmate's Eighth Amendment challenge to lack of outdoor exercise while in disciplinary segregation); White v. Nix, 7 F.3d 120 (8th Cir. 1993) (considering Eighth Amendment challenge to placement of inmate in screened cell as punishment for altercation with another inmate); Ort v. White, 813 F.2d 318, 321 (11th Cir. 1987) ("Eighth amendment principles apply not only to judicially imposed punishments, but also when conditions of confinement constitute the punishment at issue. . . . The limitations imposed by the amendment thus provide the proper framework for

evaluating challenges to various schemes of prison discipline."); Madyun v. Franzen, 704 F.2d 954, 960 (7th Cir. 1983) ("We have not hesitated to hold in appropriate cases that seriously disproportionate punishments meted out by state prison officials may violate the Eighth Amendment.").

Within this circuit, the parties point to Reed v. McBride, 178 F.3d 849 (7th Cir. 1999), a case in which an inmate filed suit, alleging that he had been deprived of meals for three to five days at a time on several occasions. He did not receive meals when he did not have his identification badge at the time they were served and he did not have his identification badge on a number of occasions because he was not allowed to retrieve it whenever he returned to the facility after receiving medical treatment at a hospital. Id. at 851. The court noted that it had "never addressed the question of whether depriving a prisoner of food for any period of time violates the Eighth Amendment." Id. at 853. The court began its analysis by citing Wilson v. Seiter, 501 U.S. 294 (1991), in which the Supreme Court stated "in dicta that it would be an Eighth Amendment violation to deny a prisoner an 'identifiable human need such as food.'" Reed, 178 F.3d at 853 (quoting Wilson, 501 U.S. at 304). Next, the court cited three cases in which other circuit courts of appeal had analyzed food deprivation claims and either found Eighth Amendment violations or concluded that the inmate's allegations stated a claim under the Eighth Amendment. Reed, 178 F.3d at 853. The court held that a food deprivation claim could satisfy the

objective component of the Eighth Amendment analysis depending on the "amount and duration of the deprivation." Id. Noting that the inmate in the case was ill prior to the deprivations and the absence of any "extraordinary or extenuating circumstances," the court concluded that the inmate's allegations were sufficient to avoid dismissal. Id. at 853-54.

Reed appears to be the only case in which the Court of Appeals for the Seventh Circuit has considered an Eighth Amendment claim for food deprivation and its holding does not clearly establish the unconstitutionality of defendants' conduct in this case. Moreover, Reed is not "on all fours" with the present case because it does not appear that food was withheld to discipline voluntary inmate conduct or to compel a change in conduct. Id. at 851 (noting that inmate was not allowed to retrieve identification badge needed to receive meals). In the absence of controlling authority in this circuit, I must look to decisions from other circuits that establish a clear trend with respect to the issue. Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994).

Cases dealing with the use of food deprivation as a disciplinary measure indicate that there are limits on the ability of prison officials to withhold food because of inmate conduct. For example, in Moss v. Ward, 450 F. Supp. 951 (W.D.N.Y. 1978), an inmate alleged that he was deprived of food for four days because he did not follow a rule requiring inmates to turn in all of their utensils from their last meal before they received their next meal. The rule was designed to prevent prisoners from using utensils to collect human waste to throw at

prison guards. The inmate refused to turn in a plastic cup, claiming that he needed it for his dentures. The court granted summary judgment to the inmate on his Eighth Amendment claim, stating that "prison officials cannot impose such severe sanctions for breaking a disciplinary rule . . . on prisoners when there is no showing that the prisoner is engaging in the type of conduct the rule is designed to prevent. Id. at 596. (I note that neither party presented evidence in conjunction with this motion concerning whether plaintiff exposed himself to prison officials at meal delivery times.) The court stated further that the "punishment was grossly disproportionate to the offense and went beyond what was necessary to achieve the state's goals." Id. at 597. See also Cunningham v. Jones, 567 F.2d 653 (6th Cir. 1977) (remanding for further factual development inmate's Eighth Amendment challenge to "slow starvation diet" consisting of total deprivation of food for four days and one meal every third day for several weeks thereafter imposed as punishment for attempted escape).

A similar policy was at issue in Williams v. Coughlin, 875 F. Supp. 1004 (W.D.N.Y. 1995). In Williams, an inmate alleged that he had been denied food for two days in violation of the Eighth Amendment because he did not turn over utensils. The court refused to grant summary judgment to the prison officials, relying on Moss and several other decisions. Id. at 1011-13 (citing Robles v. Coughlin, 725 F.2d 12 (2d Cir. 1983) (refusing to dismiss complaint alleging food deprivation for twelve days); Dearman v. Woodson, 429

F.2d 1288 (10th Cir. 1970); Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078 (5th Cir. 1991); Hodge v. Ruperto, 739 F. Supp. 873 (S.D.N.Y. 1990) (allegations of food and water deprivation and crowded and unsanitary confinement allow reasonable inference of deliberate indifference)). The court ruled further that there was an issue of fact regarding the question of deliberate indifference, noting that "the risks of extended periods of food deprivation might well be regarded as obvious." Williams, 875 F. Supp. at 1014.

Finally, in Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078 (5th Cir. 1991), an inmate alleged food deprivation by jail officials for thirteen days. The officials argued that the inmate was denied food only because he did not follow a policy requiring inmates to be fully dressed for meals. In addition, the officials argued that they were entitled to qualified immunity. Noting that the "mere existence of such a regulation is not an automatic shield against a civil rights suit," the court ruled that plaintiff's allegations of continuous food deprivation stated a claim under the Eighth Amendment. Id. at 1083. Because food deprivation was a "form of corporal punishment," the Eighth Amendment imposed limits on its use. Id. The court also rejected the officials' qualified immunity argument because "this circuit has long held that state prisoners are entitled to reasonably adequate food." These cases illustrate what should be an obvious point: the use of food deprivation as a disciplinary measure is subject to the limits imposed by the Eighth Amendment, even when the only reason for the deprivation is an inmate's failure to follow

prison regulations.

Defendants rely on several orders issued by this court in other cases concerning the Secure Program Facility's meal delivery rules in which this court dismissed food deprivation claims as legally frivolous. Williams v. Berge, No. 02-C-0070-C, 2002 WL 32350038, at *3 (W.D. Wis. Apr. 3, 2002). Those cases did not involve the extended periods of deprivation of all meals alleged by plaintiff in this case. Williams concerned a prisoner who was denied breakfast or lunch over the course of a month. In the present case, plaintiff alleges denial of all meals on two separate occasions for eight consecutive days as well as at various other times over a three to four year period. The allegations of total deprivation presented in this case stand in stark contrast to the comparably minor deprivations at issue in Williams.

Setting aside the parsing of case law, it appears that this case involves conduct that a reasonable state actor would recognize as obviously beyond the limits set by the Eighth Amendment. It is difficult to see why defendants would need to resort to case law or statute before realizing that an inmate who did not receive hundreds of meals over a three or four year period, including two week-long stretches in which that inmate did not receive any meals, was being subjected to cruel and unusual punishment regardless of the reason for the deprivations. Cf. Brown v. Thompson, 868 F. Supp. 326, 330 (S.D. Ga. 1994) ("Denial of food and medical attention are, *prima facie*, clearly established violations of the Eighth Amendment . . . As such, qualified immunity is not appropriate in this context. Any

reasonable prison official is fully aware that deprivation of food and medical care for serious medical conditions is illegal; it would be beyond credibility for prison medical staff to claim ignorance as to the potentially constitutional implications of denying inmates basic necessities of life."). Considering the amount and duration of the deprivations alleged by plaintiff, a reasonable state actor would know that defendants' persistence in enforcing the meal delivery policy, even though plaintiff chose not to comply with it, denied plaintiff "the minimal civilized measure of life's necessities." Rhodes, 452 U.S. at 347.

Qualified immunity is designed to give public officials "the benefit of legal doubts." Elliott v. Thomas, 937 F.2d 338, 341 (7th Cir. 1991). A prisoner's right to adequate food was not in doubt in 2000 and has not been in doubt for years. Likewise, the applicability of the Eighth Amendment to prison disciplinary measures was clearly established by 2000. Assuming as I must that plaintiff's allegations are true, I find that defendants' conduct does not straddle the line between legal and illegal conduct. At this stage of the litigation, I cannot conclude that defendants are entitled to qualified immunity.

B. Monetary Damages

Defendants note that to the extent plaintiff seeks monetary damages from defendant Berge in his official capacity, plaintiff's claim is barred because defendant Berge is not subject to suit under § 1983 in his official capacity. Sanville, 266 F.3d at 732-33 (official

capacity claims for money damages not cognizable under § 1983). Plaintiff contends that he is suing defendant Berge for monetary relief in his individual capacity and seeks only injunctive relief against defendant Berge in his official capacity. A plaintiff seeking prospective relief against a state official in his official capacity may bring his claim under § 1983. Williams v. Wisconsin, 336 F.3d 576, 580-81 (7th Cir. 2003). Thus, it appears that defendants' argument is moot because plaintiff is not seeking monetary relief against defendant Berge in his official capacity.

ORDER

IT IS ORDERED that defendants' motion to dismiss is DENIED.

Entered this 8th day of November, 2004.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge