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United States District Court,
W.D. Wisconsin.

Berrell FREEMAN, Plaintiff,
v.
Gerald BERGE, Warden, in his official and individual capacities; Peter Huibregtse, Deputy Warden, in his individual capacity; Gary Boughton, Security Director, in his individual capacity; and Brad Hompe, Unit Manager, in his individual capacity, Defendants.

No. 03-C-0021-C. | May 16, 2005.

Attorneys and Law Firms

Berrell Freeman, pro se.

Corey F. Finkelmeyer, Assistant Attorney General, Madison, WI, for Defendants.

Opinion

OPINION AND ORDER

CRABB, J.

***1** In a recent case, the Court of Appeals for the Seventh Circuit held that the denial of meals to a prisoner is not punishment within the meaning of the Eighth Amendment if the denials are a response to the prisoner's refusal to obey a valid institutional regulation. *Rodriguez v. Briley,* 403 F.3d 952, 952-53 (7th Cir.2005) ("deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment"). *Rodriguez* bears directly on the case before the court, in which plaintiff Berrell Freeman sued prison officials Gerald Berge, Peter Huibregtse, Gary Boughton and Brad Hompe pursuant to 42 U.S.C. § 1983 for damages and injunctive relief. Plaintiff alleged that he had suffered injuries as a result of defendants' enforcement of an institution policy under which inmates who do not wear pants (shorts or trousers), stand in the middle of their cells and turn on their cell lights before their meals are delivered are considered to have refused the meals. Plaintiff contended that defendants had 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. In addition to the meal policy claim, plaintiff raised a number of other claims about the conditions in which he was held at the Wisconsin Secure Program Facility, all of which were dismissed in pretrial rulings.

At trial, plaintiff adduced evidence that he had been denied meals on hundreds of occasions over a period of about 27 months because he had refused to put shorts or pants over his underwear or turn on his light in accordance with the meal delivery policy, had worn a sock around his head, refused to clean his cell or slept through the announcement of the meal. He missed meals for three days in April 2001; he missed approximately 242 meals between July 6, 2001 and November 3, 2001; he missed all meals for two consecutive days in April 2002; he missed meals for at least eight consecutive days in June through early July 2002; he missed meals for several consecutive days in February 2003; he missed meals for three consecutive days in March 2003; he received only his breakfast meal each day from May 18 until June 5, 2003; he missed all meals for two periods in September 2003, one lasting two days and one lasting four; and he missed all meals for at least eight straight days during October 2003. Plaintiff testified that as a result of the missed meals, he lost weight, had headaches, constipation, trouble breathing and walking, suffered from depression and started hearing and seeing things.

At the end of the liability phase of the trial, the jury found that plaintiff had been subjected to a serious deprivation of his basic need for food while he was confined at the Secure Program Facility between April 23, 2001 and October 12, 2003 and that defendants Gerald Berge, Peter Huibregtse and Brad Hompe had acted or failed to act with deliberate indifference or reckless disregard of the inhumane conditions of confinement complained of by plaintiff. The jury found no liability as to defendant Gary Boughton. In the damages phase, the jury found that plaintiff suffered physical injury from defendants' action or inaction. The jury was sufficiently concerned about plaintiff's treatment that it awarded him $50,000 in compensatory damages and $400,000 in punitive damages against each of the remaining defendants. Following the entry of judgment, defendants renewed their motion for judgment as a matter of law and moved in the alternative for a new trial or a remittitur of the compensatory damages in the amount of $25,000. Plaintiff filed a motion relating to attorney fees.

***2** Shortly after the post-trial briefing was completed, the Court of Appeals for the Seventh Circuit decided *Rodriguez,* 403 F.3d 952. The rule at issue in *Rodriguez* was one that required inmates to store their belongings in a storage box before they left their cells; if they did not do so, they were not allowed to leave the cell, even for a shower or a meal. Rodriguez refused to put his belongings into his storage box with the result that he missed about

75 showers and between 300 and 350 meals and lost 90 pounds over the course of 18 months. The court of appeals held that he was never subjected to any "punishment"; rather, he punished himself. "As soon as Rodriguez puts his belongings in the storage box, he can leave his cell and go to the cafeteria. So, he was not punished, and we need not decide whether, or how many, skipped meals constitute a cruel and unusual punishment for violation of a valid prison regulation." *Id.* at 953. The court added that at some point, "refusal to eat might turn suicidal and then the prison would have to intervene. Likewise if noncompliance with the rule were a product of insanity." *Id.* (internal citations omitted).

Plaintiff suggests that his case is distinguishable from *Rodriguez* because Rodriguez never challenged the validity of the rule requiring him to stow his belongings before leaving his cell and because the rule had a safety or security purpose. (It promoted fire safety, facilitated cell searches and "in other ways as well promote safety and security." *Id.* at 952.) Plaintiff points out that he was denied meals not only for failing to wear pants but on one occasion, for failing to clean the blood and feces he had smeared on the walls of his cell.

Nothing in the court of appeals' holding suggests that the court would view the rules at issue in this case as "invalid" for the purpose of determining whether plaintiff was subjected to punishment for refusing to follow them. The law gives prisons and their administrators wide latitude with respect to day-to-day operations. *Bell v. Wolfish,* 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The rules at issue in this case could be justified as designed to decrease incidents of sexual exhibitionism, safety (standing in mid-cell with the lights on protects the officers who are setting food trays on the trap, as does not being able to wear a sock around one's head to hide a potential weapon), health and cleanliness.

In *Rodriguez,* the court of appeals had no reason to decide whether an inmate might have an actionable Eighth Amendment claim if he could show that he had suffered serious harm that did not rise to the level of being "suicidal" or to any other "substantial risk of serious harm" because that issue was not present in the suit. The consequences of Rodriguez's refusal to obey the rule were limited to weight loss (which the court seemed to think was beneficial to him), fatigue and a rash. It is likely that the court would view a showing amounting to a substantial risk of serious harm as sufficient to change the calculus. Although prison officials may legally deny food to inmates who refuse to comply with institution rules, they cannot stand by and allow an inmate to bring upon himself a substantial risk of serious harm to his health or safety. *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). As I noted in the December 17, 2003 order in this case denying defendants' motion for summary judgment, "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." Dkt. # 129 at 16. At some point, intervention is required to preserve the inmate's health and life.

***3** In the December 17 order, defendants were denied summary judgment on the ground that a reasonable jury could find that plaintiff was subjected to a substantial risk of serious harm to his health when he was denied food as many as 242 times between July and November 2001. Defendants argued that the Eighth Amendment did not apply to a case of food deprivation when the inmate could have received the food if he had chosen to comply with the rule at issue. In response to this argument, I noted that it was true that no court had held that using food as a tool for behavior modification was a violation of the Eighth Amendment in all circumstances, although some courts had questioned the penological value of the practice. In plaintiff's case, however, the evidence that was undisputed for the purpose of summary judgment showed that he had been denied food repeatedly for periods lasting several days or longer. I rejected defendants' argument to the extent that they argued that there were no limitations on the enforcement of compliance with prison rules so long as the prisoner always has the choice of complying. Such an approach seemed inconsistent with the case law holding that prison officials may be liable if they are shown to have been deliberately indifferent to an inmate's risk of harming himself in a suicide attempt, even though the immediate cause of the injury is the inmate's own actions. In my view, the question was whether the inmate's nutrition is sufficient to maintain his health; if it was not, an Eighth Amendment violation could be made out even if the defendants had denied the inmate food for violations of rules and not because of malice or neglect. *Williams v. Greifinger,* 97 F.3d 699, 705 (2d Cir.1996) (even when inmate holds " 'the key to his cell,' in the sense that by agreeing to comply with prison rules he could have achieved release from segregation; ... that fact in no way relaxe[s] the court's inquiry into the adequacy of the conditions to which [inmate] was subjected"); *see also Cooper v. Sheriff, Lubbock County, Texas,* 929 F.2d 1078, 1083 (5th Cir.1991) (holding that prisoner stated cause of action when he alleged that prison officials had withheld food from him for long periods of time because he refused to follow dress regulations for meals; "facially permissible form of punishment may, for example, through continual use inflict cruel and unusual punishment").

Rodriguez, 403 F.3d 952, does not undermine the view that at some point, the denial of food to an inmate may violate the Eighth Amendment even if the denial is the result of the inmate's own choice not to follow the rules. To do so, however, the denial must result in the substantial risk of serious harm. It is only extreme

deprivations that make out an Eighth Amendment claim. *Hudson v. McMillian,* 503 U.S. 1, 8-9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (holding that only "those deprivations denying the 'minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment claim").

***4** In the course of ruling on the parties' motions prior to trial, I understood plaintiff to be raising an "as applied" challenge to defendants' policy. For example, in the order denying defendants' motion for qualified immunity, I stated, "I do not understand [plaintiff's] second amended complaint to present a facial challenge to the [meal] policy. Rather, as I read the complaint, [plaintiff] 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." Nov. 10, 2004 Op. & Order, dkt. # 181, at 10. At trial, however, plaintiff based his case on a facial challenge to the policy of using food to coerce behavior. His counsel began her opening statement by saying

> This case is about whether the Wisconsin Prison System can withhold the food from prison inmates as a punishment for not following prison rules or whether that practice violates the United States Constitution.

In light of the decision in *Rodriguez,* it is clear that this facial challenge to the policy is untenable. However, the outcome would have been the same even if he had continued to challenge the policy as it was applied to him because he was unable to show that he had been subjected to a substantial risk of serious harm. He adduced no evidence that before October 2003, he had ever been denied more than nine meals in succession, so as to trigger the institution's policy of bringing in a doctor and nurse to assess an inmate's health status and he admitted that nurses started visiting him in October, which is when he missed nine consecutive meals. He testified that he continued to drink water even when he missed meals and that he saw nurses during the periods when he was not receiving every meal. His own expert witness testified that plaintiff's lack of food could have caused him headaches, dizziness, muscle weakness, inability to stand for long periods of time and difficulty breathing and talking but she did not identify these particular consequences as serious physical harm. She testified also that so long as plaintiff was drinking water, he could go without food for several weeks before experiencing organ failure. She did note one study in which 36 healthy men in the military were given only half of their caloric requirements for a six-month period and that two or three of the men had become psychotic at the end of the study. In addition, she testified that starvation, or organ failure, would be the end of a continuum of physical harm that individuals suffer as a result of lack of food. She agreed that nothing in plaintiff's medical records showed that he had come anywhere near the point of organ failure and that she would not expect to see a significant health risk where an individual goes three days without eating but continues to drink liquids. Also, she noted that the institution records showed that on several occasions a Dr. Maier had ordered a high caloric, high protein diet for plaintiff when he was losing weight and that the diet orders were carried out.

***5** One of the institution nurses testified that when plaintiff did miss more than nine consecutive meals in October 2003, the institution initiated its hunger strike protocol, under which nurses began monitoring plaintiff, giving him information about the risks of not eating and assessing his vital signs. Had plaintiff continued to refuse to follow the meal service policy, the nurses would have had a doctor see him and they could have taken additional steps to assess his condition, such as weighing him and drawing blood for analysis.

Defendant Hompe testified that institution policy requires staff to generate an incident report when an inmate misses nine consecutive meals and give notice to the health services unit, clinical services, the unit manager and the security director. At that point, the health services unit places the inmate on hunger strike protocol for monitoring and both the sergeant and the unit manager talk to the inmate to try to find out why he is refusing meals. A multidisciplinary meeting is held to discuss the inmate and others with special needs to make sure that the inmate is being monitored and the doctor is assessing him. In extreme conditions, the institution will notify lawyers and obtain a court order for forced feeding or hydration.

The trial evidence falls short of establishing that plaintiff's course of conduct and defendants' response subjected plaintiff to a substantial risk of serious harm. There was no evidence that any of his physical problems amounted to serious harm; he missed more than nine consecutive meals on only one occasion, in October 2003, and he continued to drink water when he was missing meals. He never reached the point of organ failure or came close to it. There was no evidence that he became psychotic or suffered any other serious mental reaction from his lack of food. Therefore, the jury's finding of liability cannot be sustained. Because plaintiff did not prove he was at risk, he did not prove the first of the two prongs that are necessary to establish an Eighth Amendment claim: a substantial risk of serious harm. Without a showing of a substantial risk, he has no basis on which to argue the second prong: that defendants were deliberately indifferent or acted in reckless indifference to the risk. Plaintiffs' failure to prove the facts necessary to

sustain his Eighth Amendment claim moots the issue of defendants' entitlement to qualified immunity and plaintiff's motion relating to attorney fees.

Although the verdict cannot be upheld in light of the court of appeals' decision in *Rodriguez,* 403 F.3d 952, and plaintiff's failure to show that the cumulative effect of the meals he missed put him at substantial risk of serious harm, it would be unfortunate if the Department of Corrections disregarded the expression of public opinion that the jury's verdict represents. It is evident that the jury found the institution's policy of using food to coerce behavior to be inhumane in an institution in which all inmates are deprived of most forms of sensory stimulation and many lack the mental or emotional wherewithal to make intelligent decisions.

ORDER

***6** IT IS ORDERED that the motion of defendants Gerald Berge, Peter Huibregtse and Brad Hompe for judgment as a matter of law is GRANTED; the judgment entered herein on December 30, 2004 is VACATED and the clerk of court is directed to enter judgment for all defendants in all respects. FURTHER, IT IS ORDERED that plaintiff Berrell Freeman's motion relating to attorney fees is DENIED as moot.