STEPHEN NELSON, Plaintiff, v. CA. DEPT OF CORRECTIONS, Defendant.

No. C 02-5476 SI (pr)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2004 U.S. Dist. LEXIS 4521

March 17, 2004, Decided
March 18, 2004, Filed; March 22, 2004, Entered in Civil Docket

DISPOSITION: [*1] Defendants' motion for summary judgment granted. Nelson's application to file lengthy opposition brief granted. Judgment entered.

COUNSEL: Stephen J. Nelson, Plaintiff, Pro se, Corcoran, CA.

For J. Tynes, Assistant Warden, D Facility, Muniz, Ct., J. Jackson, D-Facility Floor Staff, Bracken, D-Facility Floor Staff, Defendants: Maya Manian, CA Attorney General's Office, San Francisco, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Stephen J. Nelson, an inmate at the California State Prison in Corcoran, filed this *pro se* civil rights action under *42 U.S.C. § 1983* complaining that prison officials at Salinas Valley State Prison ("SVSP") required him to live and exercise in inadequate clothing. Defendants now move for summary judgment on the grounds that the undisputed facts show that they did not violate Nelson's rights under the *Eighth Amendment* and that they are entitled to qualified immunity. For the reasons discussed below, the motion for summary judgment will be granted.

BACKGROUND

Nelson spent five months in administrative segregation and had about six [*2] hours of exercise a week. The weather was sometimes cold, wet and/or windy. The question here is whether defendants have *Eighth Amendment* liability for housing him and sending him to the exercise yard in just boxer shorts and a t-shirt (and shoes and socks).

The following facts are undisputed unless otherwise noted:

Nelson was confined in the administrative segregation ("ad-seg") unit at SVSP for five months, from August 8, 2001 until January 10, 2002. [1] He was then transferred to another prison. Nelson was put in ad-seg after prison staff discovered in his cell an "inmate manufactured slashing type weapon along with several pieces of flat metal and a piece of a hack saw blade." Meza Decl., Exh. 1.

1 Nelson states in his declaration that he also was in ad-seg during November 2000 - February 2001, but that time frame is not mentioned in his complaint, is beyond the scope of this action, and is irrelevant to the determination of the merits of

his claim in this action against defendants. Nelson cannot simply expand his claim for relief months after his complaint has been served and defendants have filed their responsive pleadings by making new and different assertions in a declaration.

[*3] SVSP's Operational Procedure 29 ("OP 29") was a 42-page document governing many aspects of life for ad-seg inmates, such as searches, yard time, property restrictions, escort procedures, meals, and mail. [2] Inmates in ad-seg were subjected to very strict property controls. As relevant here, OP 29 provided that each inmate was to receive two pairs of socks, two t-shirts, one blue denim jacket without buttons, two towels, two pairs of undershorts, one pair soft soled slippers, two blankets, and two sheets. OP 29 at 5. Inmates in ad-seg were *not* allowed to have jumpsuits, unlike the general prison population.

2 OP 29 states that it was originally developed in March 1996 and was revised several times thereafter. The version in place while Nelson was in ad-seg was the version attached as Exhibit 2 to the Muniz Declaration.

The parties dispute whether the blue denim jackets listed in OP 29 were available to the inmates. Nelson has presented evidence that the jackets were not available and that prison officials [*4] told him the jackets had been ordered. Defendants contend the jackets were available.

Nelson states in his complaint that he was on walk-alone [3] status for some of his stay in ad-seg and was on the control compatible exercise yard for November, December and the part of January that he was in ad-seg. OP 29 had a yard schedule that provided each exercise group with three exercise periods per week from 8:00 - 11:30 a.m. or 12:00 - 3:30 p.m. OP 29 provided for walk-alone exercise "on a continuous rotating basis. Walk alone exercise yard access will be for two-hour periods a minimum of five times per week." OP 29 at 36. Inmates were allowed to choose whether to go to the yard but once an inmate went to the yard, he had to remain there until recall. OP 29 at 37. Defendants urge that inmates could use common sense to leave the yard early if it was too cold, but OP 29's provision that "common sense shall prevail in extremely inclement weather" does not state whether the common sense was that of the guards or of the inmates and the court will not presume it was the latter especially when the same paragraph stated that inmates had to remain on the yard until recall. OP 29 at 37.

3 Walk-alone status was "normally reserved for those inmates with validated safety concerns or assaultive and disruptive behavior towards others, regardless of racial or gang affiliations." OP 29 at 36.

[*5] Nelson was outdoors for exercise about six hours per week during his stay in ad-seg. *See* Complaint, p. 3; Opposition Brief, p. 11. He did not describe how the six hours broke down -- i.e., how many days he went out and for what period of time on each day, except to note that the exercise sessions started at 8:00 a.m. During the time he was outdoors (as well as indoors) he did not have a jumpsuit or jacket, and was in boxer shorts and t-shirt (hereinafter occasionally referred to as his "underwear"). [4]

4 OP 29 provided that inmates were permitted to take only the following to the yard: a pair of undershorts, a blue denim jacket, a pair of soft-soled shoes or thongs, a pair of socks, a t-shirt, soap and a towel. OP 29 at 37. As noted elsewhere, the parties disagree as to whether the listed blue denim jacket was actually available.

Nelson presented weather data for the area of SVSP, the accuracy of which defendants do not dispute. According to Nelson's unnumbered exhibit, the temperatures and precipitation [*6] amounts were:

Month	Average Temperature	Lowest & Highest Temperatures	Total Monthly Precipitation
August 2001	62.2	47 - 77	trace amount
September 2001	62.0	47 - 99	0.06
October 2001	60.7	41 - 90	0.03

November 2001	56.5	34 - 83	0.91
December 2001	50.8	34 - 69	1.62
[5]January 1-10, 2002	52.4	40 - 62	0.16

5 Nelson was only in ad-seg until January 10, 2002, and thus missed most of that month's colder weather. The temperature chart submitted by Nelson showed that the average temperature for the *entire* month of January was 47.3, but also shows that the colder days in January began on about January 14th -- after Nelson was transferred. The weather at SVSP after he left is irrelevant to his claim. [*7]

Nelson stated that inmates had to "keep excersizing, moving, or all huttle together or repeatedly stand in the shower to try and keep warm. When I again voiced this violation at my classification I was told don't go outside if you don't like it by A. Warden Tynes." Complaint, pp. 4-5 (grammar and spelling errors in original). Nelson's portrayal of a perpetually cold, rainy and windy climate is not supported by his exhibits: Nelson's exhibits show that there were only six days on which the entire day's rain total exceeded one-fifth of an inch and only five days on which the mean wind speed exceeded ten miles per hour. [6]

6 The only rain totals exceeding one-fifth an inch occurred on November 12 (0.46"), November 24 (0.22"), November 29 (0.20"), December 14 (0.25"), December 21 (0.55") and December 29 (0.26"). The only mean wind speeds exceeding ten miles per hour occurred on November 12 (14.6 mph), December 5 (10.5 mph), December 29 (23.46 mph), and January 5 (10.9 mph).

Nelson does not dispute defendants' evidence that, during some months of the year, excessive heat was a problem at SVSP. SVSP had a heat plan for May through the end of October because outdoor temperatures could be quite hot in Soledad, California. Thus, for more than half the time Nelson was in ad-seg the prison had in place a plan anticipating high temperatures.

Nelson also does not dispute that the interior of the prison was climate controlled or that blankets and sheets were available to inmates while in their cells. Muniz Decl., P15 ("Temperatures inside the building are climate controlled and, therefore, jackets are not necessary"); OP 29 at 5 (blankets and sheets were provided to ad-seg inmates).

VENUE AND JURISDICTION

Venue [*8] is proper in the Northern District of California because the events or omissions giving rise to 's claims occurred at Salinas Valley State Prison in Monterey County, which is located within the Northern District. *See 28 U.S.C. §§ 84,1391(b).* This Court has federal question jurisdiction over this action brought under *42 U.S.C. § 1983. See 28 U.S.C. § 1331.*

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and [that] the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* A court will grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* [*9] A fact is material if it might affect the outcome of the lawsuit under governing law, and a dispute about such a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

Generally, as is the situation with defendants' challenge to Nelson's *Eighth Amendment* claim, the moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by

his own affidavits, or by the 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex, 477 U.S. at 324* (citations omitted).

Where, as is the situation with defendants' qualified immunity defense, the moving party bears the burden of proof at trial, the moving party must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. *See Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992).* [*10] A defendant must establish the absence of a genuine issue of fact on each issue material to the affirmative defense. *Id. at 1537*; *see also Anderson v. Liberty Lobby, Inc., 477 U.S. at 248*. When the defendant-movant has come forward with this evidence, the burden shifts to the non-movant to set forth specific facts showing the existence of a genuine issue of fact on the defense.

A verified complaint may be used as an opposing affidavit under *Rule 56*, as long as it is based on personal knowledge and sets forth specific facts admissible in evidence. *See Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995)* (treating plaintiff's verified complaint as opposing affidavit where, even though verification not in conformity with *28 U.S.C. § 1746*, plaintiff stated under penalty of perjury that contents were true and correct, and allegations were not based purely on his belief but on his personal knowledge).

The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).* [*11] The evidence must be viewed in the light most favorable to the nonmoving party, and the inferences to be drawn from the facts must be viewed in a light most favorable to the nonmoving party. *See id. at 631*.

DISCUSSION

A. *The Eighth Amendment, Exercise And Clothing*

The Supreme Court has made clear that prison conditions may be "restrictive and even harsh," but that they may not deprive inmates of "the minimal civilized measure of life's necessities." *Rhodes v. Chapman, 452 U.S. 337, 347, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981)*. In order to establish that conditions of confinement have reached such a level of deprivation, a plaintiff must make both objective and subjective showings. *See Farmer v. Brennan, 511 U.S. 825, 834, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994)*. The plaintiff must show that the objective level of deprivation was sufficiently serious and that the defendant was subjectively, deliberately indifferent to inmate health or safety. *Id.* To survive summary judgment, Nelson must show that SVSP's requirement that he live in and attend his outdoor exercise periods without a jacket or a jumpsuit deprived him of the minimal civilized measure [*12] of life's necessities and that defendants acted with deliberate indifference to his health or safety.

1. *Exercise*

Exercise is one of the basic human necessities protected by the *Eighth Amendment*. *LeMaire v. Maass, 12 F.3d 1444, 1457 (9th Cir. 1993)*. Prisoners "confined to continuous and long-term segregation" may not be deprived of outdoor exercise. *Keenan v. Hall, 83 F.3d 1083, 1089-90 (9th Cir. 1996), amended, 135 F.3d 1318 (9th Cir. 1998)*. A lengthy deprivation of outdoor exercise to such prisoners is unconstitutional. *See LeMaire, 12 F.3d at 1458*; *see, e.g. Lopez v. Smith, 203 F.3d 1122, 1133 (9th Cir. 2000)* (en banc) (denial of outdoor exercise for 6-1/2 weeks satisfies objective prong of *Eighth Amendment* deliberate indifference test).

Nelson asserts that the court overlooked his separate claim that being placed on walk-alone status and being allowed only six hours of exercise per week violated his constitutional rights. Opposition Brief, p. 11. The court did not see that claim in the original complaint, but now will address it. Nelson pled that he was in a group yard in November, December [*13] and January, from which one can infer that he was on walk-alone status in August, September and October. Accepting as true that Nelson was allowed to exercise for just six hours per week for three months alone and more than two months with a group, there would not be an *Eighth Amendment* violation. Whether he exercised alone or in a group is irrelevant because there is no right to group exercise. Being allowed six hours of outdoor exercise per week for five months, as a matter of law, does not amount to cruel and unusual punishment. There was no long-term denial of outdoor exercise. Nelson had access to regular exercise periods and the exercise was to be done outdoors: OP 29 scheduled 3 periods per week for regular yard and 5 periods a week for walk-alones and, regardless of whether OP 29 was actually followed, Nelson admittedly

received six hours of outdoor exercise time per week. To the extent a straight exercise claim existed in the complaint, it is now dismissed. Because there is no merit to the claim, the court need not deal with Nelson's failure to show any particular defendant's role in the alleged violation and need not afford defendants an opportunity to raise defenses thereto, [*14] such as a failure to exhaust administrative remedies or qualified immunity.

Having resolved any doubt that there was a violation based strictly on the number of hours Nelson was allowed to exercise, the court returns to what has appeared to be the real gravamen of Nelson's case, his claim that he was required to live in his underwear and to exercise in his underwear. As a matter of principle, Nelson is correct that a prisoner generally cannot be forced to sacrifice one constitutional right in order to exercise another. *See Allen v. City & County of Honolulu, 39 F.3d 936, 940 (9th Cir. 1994)*. It is thus necessary to look at *Eighth Amendment* law on clothing to see if he has raised a triable issue that he was forced to make such an election.

2. *Clothing*

In his *Eighth Amendment* challenge to the clothing restrictions, Nelson must show an objectively, sufficiently serious, deprivation and that the prison official acted or failed to act with deliberate indifference to an excessive risk to inmate heath or safety. *See Farmer, 511 U.S. at 834* (citing *Wilson v. Seiter, 501 U.S. 294, 297, 298, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991))*. In determining whether [*15] a deprivation of a basic necessity is sufficiently serious to satisfy the objective component of an *Eighth Amendment* claim, a court must consider the circumstances, nature, and duration of the deprivation. The more basic the need, the shorter the time it can be withheld. *See Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000), cert. denied, 532 U.S. 1065, 150 L. Ed. 2d 209, 121 S. Ct. 2215 (2001).*

A. *A Sufficiently Serious Condition*

"Although the routine discomfort inherent in the prison setting is inadequate to satisfy the objective prong of an *Eighth Amendment* inquiry, 'those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an *Eighth Amendment* violation.'" *Johnson, 217 F.3d at 731 (9th Cir. 2000)*. The Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer, 511 U.S. at 832* (citations omitted). The list of basic necessities that [*16] must be provided to inmates has long included clothing. *See id.; Helling v. McKinney, 509 U.S. 25, 32, 125 L. Ed. 2d 22, 113 S. Ct. 2475 (1993)*; *DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 198-99, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989)*; *Hoptowit v. Ray, 682 F.2d 1237, 1258 (9th Cir. 1982)*. "The denial of adequate clothing can inflict pain under the *Eighth Amendment*." *Walker v. Sumner, 14 F.3d 1415, 1421 (9th Cir. 1994)* (inmate who alleged he did not receive a jacket and his own boots when he returned to prison did not show a triable issue of fact because did not describe the footwear he had received, did "not allege that the weather conditions were such that the deprivation of a jacket inflicted pain of a constitutional magnitude," and did not describe the clothing that he did have); *see also Johnson v. Lewis, 217 F.3d at 729-32* (*Eighth Amendment* claim stated by inmates who, following separate riots were kept outside without blankets or other coverings for four days in 70-94 degree temperatures on one occasion and for 17 hours on another occasion when temperature fell to 22 degrees while riots were investigated; [*17] inmates also alleged inadequate food, water, and toilet facilities). An *Eighth Amendment* violation is more apt to be found when inmates are deprived of clothing in extreme weather conditions. *See e.g., Palmer v. Johnson, 193 F.3d 346, 354 (5th Cir. 1999)* (denying motion for summary judgment based on qualified immunity where inmates were reduced to digging in the dirt to construct earthen walls as barriers against high winds while exposed for period of 17 hours); *Gordon v. Faber, 800 F. Supp. 797, 798 (N.D. Iowa 1992), aff'd 973 F.2d 686, 687-88 (8th Cir. 1992)* (affirming finding of unconstitutional deprivation where inmates forced to stand outdoors without hats or gloves for more than one hour in sub-freezing weather with significant wind-chill factor); *Balla v. Idaho State Bd. Of Corrections, 595 F. Supp. 1558, 1566, 1575 (D. Idaho 1984)* (finding constitutional violation when prison officials provided clothing that was "patently insufficient" to guard against Idaho's winter temperatures).

Nelson has shown the existence of a triable issue of fact on the objective prong by coming forward with evidence that he was kept [*18] in his underwear for five months, even during exercise sessions in sometimes cold and inclement weather.

Defendants read Nelson's complaint too narrowly, and focus exclusively on whether adequate clothing was provided for the exercise yard. The complaint is broader and concerns not only the exercise yard but also the requirement that Nelson, like all ad-seg inmates, live in just underwear for his entire stay in ad-seg. The *Eighth Amendment's* prohibition against cruel and unusual punishment has a human dignity aspect, *see Trop v. Dulles, 356 U.S. 86, 100, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958),* that seems to get lost when courts and litigants try to push certain prison conditions through the two-pronged test of objectively serious condition and deliberate indifference. Providing boxer shorts to the male inmates covered their genitals and therefore makes this case unlike the cases involving completely naked inmates. *Cf. Michenfelder v. Sumner, 860 F.2d 328, 333 (9th Cir. 1988)* (shielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity). Requiring inmates to wear [*19] loin clothes or diapers instead of boxer shorts also would take the case out of the realm of the completely naked inmates, but few would not find such clothing requirements troubling. OP 29 prohibited *all* inmates in ad-seg from wearing jumpsuits and (accepting Nelson's version of the facts as true) jackets were not available to the inmates. All ad-seg inmates had just boxers and t-shirts, regardless of whether they were in ad-seg for discipline or for their own protection and regardless of whether they were in for short terms or long terms. Nelson spent five months in just his underwear in ad-seg. Although it is an extremely close call, the court concludes that requiring Nelson to wear just his underwear for his five-month stay in ad-seg deprived him "of the minimal civilized measure of life's necessities." *Rhodes v. Chapman, 452 U.S. at 347*. The requirement that all ad-seg inmates spend all their time in only their underwear rose to the level of an objectively serious condition and met the first prong of an *Eighth Amendment* violation.

Defendants assert that OP 29 passes muster under *Turner v. Safley, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). Turner* [*20] does not apply to an *Eighth Amendment* claim. *See Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir. 1993)* (en banc). Although *Turner* does not apply, defendants' security concerns would be relevant to the *Eighth Amendment* inquiry. *Cf. Williams v. Delo, 49 F.3d 442, 446 (8th Cir. 1995)* (jail officials' removal of clothing and bedding from misbehaving inmate for four days did not meet objective prong of *Eighth Amendment* test; the deprivation of the property "served the legitimate penological goals of preventing injury to the inmate, injury to corrections officials, and damage to the facility"). Defendants did not, however, offer competent evidence regarding the reasons for OP 29's clothing restrictions: the declarant demonstrated a lack of personal knowledge when he stated the policy was in place before he arrived at his post. (Likewise, Nelson's assertions about what a state court said about the clothing policy is not competent evidence because he demonstrated no personal knowledge of the state court proceedings, even if one assumed that the state court's decision was relevant.)

Defendants also argue that relief is barred because Nelson does not claim [*21] any physical injuries as the basis for his damages against defendants. Defendants' argument is unpersuasive because the statute they cite has been construed to have a rather limited application. *42 U.S.C. § 1997e(e)* provides: "No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury." The physical injury requirement only applies to claims for mental and emotional injuries and does not bar an action for a violation of a constitutional right. *See Oliver v. Keller, 289 F.3d 623, 630 (9th Cir. 2002)* (*§ 1997e(e)* inapplicable to claims for compensatory damages not premised on mental or emotional injury); *see also Robinson v. Page, 170 F.3d 747, 748-49 (7th Cir. 1999)* (only the claim for damages for mental or emotional injury should be dismissed). Even if Nelson's complaint does include a request for damages for mental and emotional injury, it also includes a claim for an *Eighth Amendment* violation as to which the *§ 1997e(e)* requirement does not apply. In other words, damages would [*22] be available for a violation of his *Eighth Amendment* rights without regard to his ability to show physical injury. *Oliver* made this very point in holding that "*§ 1997e(e)* applies only to claims for mental and emotional injury. To the extent that appellant's claims for compensatory, nominal or punitive damages are premised on alleged *Fourteenth Amendment* violations, and not on emotional or mental distress suffered as a result of those violations, *§ 1997e(e)* is inapplicable and those claims are not barred." *Oliver, 289 F.3d at 630*.

b. *Deliberate Indifference*

A "prison official cannot be found liable under the *Eighth Amendment* for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; 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." *Farmer, 511 U.S. at 837*.

Nelson has failed to show a triable issue of fact that defendants acted with deliberate indifference. It is important to note that the Supreme Court, in discussing the necessary mental [*23] state described it as knowing of and disregarding *"an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837* (emphasis added). The Supreme Court did not describe it as deliberate indifference to the "minimal civilized measure of life's necessities," which *Rhodes v. Chapman, 452 U.S. at 347*, indicated was a benchmark for challenges to conditions of confinement.

There is no evidence before the court that living in boxer shorts and a t-shirt for five months and exercising in them six hours per week has any health or safety consequence, let alone an excessive risk to health or safety. More importantly, there is no evidence before the court that defendants knew of such a risk. Nelson presented evidence that he alerted defendants that it was cold, and alerted them to his apparently poor lungs and need for an inhaler, but did not present any credible evidence that being out in the cold actually had any known effect on one with his physical ailments. There is no judicially noticeable ailment that follows from exercising for periods of up to 3-1/2 hours in weather that dipped as low as 34 degrees. Nelson has not shown the existence of a triable [*24] issue of fact that any defendant acted with deliberate indifference to a serious risk to his health.

Defendants therefore are entitled to judgment as a matter of law on the *Eighth Amendment* claims that Nelson did not receive adequate exercise, adequate clothing, and was forced to choose between the two constitutional rights.

B. *Qualified Immunity*

The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar 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, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)*. The rule of qualified immunity "'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" *Burns v. Reed, 500 U.S. 478, 495, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991)* (quoting *Malley v. Briggs, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986))*.

In the recent case of *Saucier v. Katz, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)*, the Supreme Court set forth a particular sequence of questions to be considered in determining whether qualified [*25] immunity exists. The court must consider this threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id. at 201*. If no constitutional right was violated if the facts were as alleged, the inquiry ends and defendants prevail. *See id.* If, however, "a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. . . . 'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id. at 201-02* (quoting *Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987))*.

The first step under *Saucier* is to determine whether a constitutional violation was established. Nelson has failed to establish that defendants had violated his constitutional rights. Because no constitutional right was violated on the facts taken in the light most favorable to Nelson, defendants prevail.

In the interest of completeness, the court explains why Nelson also would [*26] lose if the inquiry proceeded to the second step of the qualified immunity analysis. The second step under *Saucier* is to consider whether the contours of the right were 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*.

The Ninth Circuit clarified the qualified immunity analysis for a deliberate indifference claim in *Estate of Ford v. Ramirez- Palmer, 301 F.3d 1043, 1049-50 (9th Cir. 2002)*. The court explained that, for an *Eighth Amendment* violation based on a condition of confinement (such as the safety risk in *Estate of Ford* or the health risk in Nelson's case), "'a prison official cannot

be found liable under the *Eighth Amendment* for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; 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 inferences.' . . . Thus, a reasonable prison official understanding that he cannot recklessly disregard [*27] a substantial risk of serious harm, could know all of the facts yet mistakenly, but reasonably, perceive that the exposure in any given situation was not that high. In these circumstances, he would be entitled to qualified immunity. *Saucier, 533 U.S. at 205*." *Estate of Ford, 301 F.3d at 1050* (quoting *Farmer v. Brennan, 511 U.S. at 834*). In *Estate of Ford*, the court explained that even though the general rule of deliberate indifference had been expressed in *Farmer*, no authorities had "fleshed out 'at what point a risk of inmate assault becomes sufficiently substantial for *Eighth Amendment* purposes.'" *Estate of Ford, 301 F.3d at 1051* (quoting *Farmer, 511 U.S. at 834 n.3*. Because it hadn't been fleshed out, "it would not be clear to a reasonable prison official when the risk of harm from double-celling psychiatric inmates with one another changes from being *a* risk of *some* harm to a *substantial* risk of *serious* harm. *Farmer* left that an open issue. This necessarily informs 'the dispositive question' of whether it would be clear to reasonable correctional officers that their conduct [*28] was unlawful in the circumstances that [they] confronted." *Estate of Ford, 301 F.3d at 1051* (emphasis in original).

Applying *Estate of Ford* here, it would not have been clear to a reasonable prison official when the risk of harm from being required to live in and exercise in just underwear changed from being a risk of some (or even any) harm, to a substantial risk of serious harm to the inmate's health. Although the law was clearly established that depriving an inmate of outdoor exercise on a long-term basis violated the *Eighth Amendment*, and although the law was clearly established that depriving an inmate of adequate clothing violated the *Eighth Amendment*, the law was not very well fleshed out on amount of clothing required to avoid an *Eighth Amendment* violation. Although the court earlier in this decision found that requiring an inmate to live in his underwear for five months was sufficiently serious to establish the first prong of an *Eighth Amendment* claim, the court recognizes the dearth of authority on the specific point of how much clothing must be given to an inmate. Nelson had two quite different situations. For the vast majority of his time in ad-seg, [*29] Nelson was in his cell in a climate-controlled environment, and had access to a blanket and sheet to provide additional warmth if the temperature was uncomfortably cold. For the six hours each week Nelson exercised, he faced occasional cold weather, very small amounts of rain, and a few windy days. When he was outdoors for exercise, correctional officers could reasonably rely on the fact that he would be exercising.

A reasonable prison official understanding that he could not be deliberately indifferent to a serious risk to inmate health could know that Nelson spent five months in no clothes other than boxer shorts and a t-shirt and know that he had only those clothes to wear when he exercised in the occasionally cold weather but reasonably perceive that Nelson's exposure to any harm was not that high when (1) Nelson spent the vast majority of his time in a climate-controlled environment, (2) Nelson was allowed, but not required, to go outside for an exercise period for up to 3-1/2 hours at a time, (3) the temperature was in the 34-50 degree range on some days, (3) notwithstanding his complaints that it was cold and he was in bad health, Nelson continued to choose to go outside for [*30] the exercise period even though he had the option to remain indoors. Nelson states that inmates had to keep moving, exercising or "all huttle [sic] together" to keep warm, Complaint, p. 4, but prison officials could reasonably expect that inmates who attended the session would actually engage in exercise, as that was what the officials were legally required to provide. Prison officials would not have satisfied their constitutional obligation to provide outdoor exercise if they had just put shackled and handcuffed inmates outdoors and made them sit on the ground. The information available to defendants did not make it so clear that Nelson would be in pain or face a serious risk to his health while inside his cell or during the six hours of exercise each week that no reasonable officer would have let him remain in just his underwear.

Because the law did not put defendants on notice that their conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *See Saucier, 533 U.S. at 202*. Defendants met their burden of proof in their moving papers. Nelson did not introduce evidence to show the existence of a genuine issue of fact on the [*31] defense. Defendants are entitled to judgment as a matter of law on the qualified immunity defense.

CONCLUSION

For the foregoing reasons, defendants are entitled to judgment as a matter of law on the merits of the *Eighth Amendment* claim and on their defense of qualified immunity against Nelson's suit. Defendants' motion for summary judgment is GRANTED. (Docket # 29.) Nelson's application to file a lengthy opposition brief is GRANTED. (Docket # 42.) Judgment will now be entered in favor of all defendants and against Nelson. The clerk shall close the file.

IT IS SO ORDERED

Dated: March 17, 2004

SUSAN ILLSTON

United States District Judge

JUDGMENT

Judgment is entered in defendants' favor and against plaintiff.

IT IS SO ORDERED AND ADJUDGED.

Dated: March 17, 2004

SUSAN ILLSTON

United States District Judge