IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JULIUS CASTRO, **Plaintiff,**	**CIVIL ACTION**
v.	**NO. 97-4983**
JOSEPH W. CHESNEY; **ROBERT SHANNON;** **LT. JOHN DOE;** **Defendants.**	

M E M O R A N D U M

Broderick, J. **November 3, 1998**

Plaintiff, Julius Castro, an inmate at the State Correctional Institution in Frackville, Pennsylvania, has brought this pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging violations of the Eighth and Fourteenth Amendments. Specifically, Plaintiff alleges that for "several days" he was placed in a cell without a mattress, linens, or blankets and was not provided with a toothbrush, toothpaste, toilet paper, or soap. Plaintiff further alleges that the cell did not have heat or running water. Plaintiff's complaint seeks compensatory and punitive damages as well as equitable relief. This Court has previously dismissed plaintiff's claims that he was being denied access to the courts and claims for money damages against the defendants in their official capacities.

Defendants Joseph W. Chesney, Superintendent of S.C.I. Frackville and Robert Shannon, Deputy Superintendent of S.C.I. Frackville have filed a motion for summary judgement under Rule

56(c) of the Federal Rules of Civil Procedure. Plaintiff responded to Defendants' Motion by filing a Statement of Claims which renews the allegations in Plaintiff's complaint, including those claims for denial of access to the courts that this Court has previously dismissed, an Objection to Defendants' Motion which makes the same allegations as the Complaint and the Statement of Claims, and an Affidavit. A copy of Defendants' Answers to Plaintiff's First and Second Set of Interrogatories and the exhibits thereto are attached to Plaintiff's Objections to the motion for summary judgement. Defendants' motion and Plaintiff's responses thereto are now before the Court. For the reasons set forth below, Defendants' motion for summary judgement will be granted.

I. SUMMARY JUDGEMENT STANDARD OF REVIEW

The Court initially recognizes that it must be particularly liberal in construing the pleadings submitted by pro se inmate litigants. Haines v. Kerner, 404 U.S. 519, 520 (1972). Because Plaintiff is pro se the Court will consider factual averments in his responses as evidence to the extent that they are not contradicted by other sworn testimony of Plaintiff. See Simpson v. Horn, No. Civ. A. 95-8028, 1998 WL 559802 at *2 (E.D.Pa. Aug. 31, 1998); Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) ("When, without satisfactory explanation, a nonmovant's

affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether or not a genuine issue of material fact exists."); Martin v. Merrell Dow Pharmaceuticals, 851 F.2d 703, 706 (3d Cir. 1988).

In order to prevail on a summary judgement motion, the moving party must show from the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgement, the Court must view the evidence in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. Big Apple BMW, Inc. v. BMW of North American, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

The Defendants bear the initial burden of demonstrating the absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A disputed factual matter is a genuine issue "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 (1986). A fact is

material if it might affect the outcome of the lawsuit under the governing substantive law. Id.

Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving party may not rely on bare assertions, conclusory allegations or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Rather, the non-movant must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992).

II. STATEMENT OF FACTS

Plaintiff has provided the Court with the following records from the Restricted Housing Unit at SCI-Frackville: the DC-17x records of the Department of Corrections for Plaintiff's cell while on the Restricted Housing Unit (RHU) from March 21, 1997 to March 26, 1997 and April 2, 1997 to April 4, 1997; portions of the RHU log book for the period at issue; and memoranda from the prison psychological services staff to RHU staff. Plaintiff has not challenged the accuracy of these records. In fact, Plaintiff relies on them heavily in his responses to Defendants' motion to

document his claims that he was deprived of various clothing, bedding, and hygiene items while on the RHU during the period from March 21 to April 4, 1997. A copy of Plaintiff's deposition is attached to Defendants' motion for summary judgement.

It is undisputed that Plaintiff was brought to the RHU at SCI-Frackville on March 21, 1997 from the Forensic Psychiatric Unit as SCI-Waymart. Plaintiff had been transferred temporarily to SCI-Waymart as a result of a suicide attempt which occurred while Plaintiff was incarcerated at SCI-Frackville previously.

Plaintiff's complaint and responses to Defendants' summary judgement motion contend that, at the time he returned to Frackville, he was strip-searched, given a paper gown, and placed in a cell without a blanket or mattress. Plaintiff alleges that the cell was a "dry cell" because it did not have any running water. Plaintiff also alleges that the cell was without heat. Finally, plaintiff alleges that he was not given any personal hygiene products including sheets, towels, toothpaste, soap, and toilet paper, and that he was not permitted to shower or go into the yard for exercise. Plaintiff alleges that these conditions continued for "several days" while he remained on the RHU. In Plaintiff's deposition he describes the period of time as being "more than a week." Plaintiff's Deposition at 10-11.

The records from the RHU at Frackville indicate that plaintiff was received onto the RHU shortly before 5:00 p.m. and

given a paper gown, a bag lunch for dinner, his medication, and a blanket and mattress.

The RHU records indicate that all items were removed from Plaintiff's cell on the evening of Sunday, March 23, 1997. Plaintiff has provided the Court with a copy of the directive from the Mental Health Unit (MHU) staff dated March 23, 1997 indicating that a nurse had evaluated Plaintiff and strongly suggesting that all items, including the mattress and blankets be removed from Plaintiff's cell until the prison psychiatrist could evaluate Plaintiff the following day. The records indicate that when an officer went to remove the items from Plaintiff's cell, as directed by the MHU staff, the officer discovered that Plaintiff had a cut on his left wrist, which Plaintiff admits was a second suicide attempt. See Plaintiff's Deposition at 17, 21. Plaintiff received medical treatment for the wound, a misconduct was issued for self-mutilation, and Plaintiff was returned to his cell.

On the morning of March 24, 1997, Dr. Harold Pascal of the MHU informed the RHU by memo, a copy of which Plaintiff has provided to the Court, that Plaintiff was permitted to have a mattress and blanket only. The records indicate that Plaintiff received these items during the 2 p.m. to 10 p.m. shift that day. Plaintiff does not dispute that he was given a mattress and blanket at this time. See Plaintiff's Deposition at 18.

On March 26, 1997, Dr. Pascal informed the RHU by memo that Plaintiff was permitted to have underwear and socks. The records indicate that this information was received by the officers on the 6 a.m. to 2 p.m. shift that day but there is a dispute as to whether or not Plaintiff received those items at that time. See Plaintiff's Deposition at 18. The records for that date also indicate that Plaintiff was given a roll of toilet paper by the 6 a.m. to 2 p.m. shift. Plaintiff alleges that this is the first time that he received toilet paper. However, Plaintiff admits in his deposition that prison staff would give him toilet paper when he asked for it "once in a while." Plaintiff's Deposition at 22.

On April 2, 1997, Dr. Pascal informed the RHU by memo that Plaintiff was permitted to have normal RHU issue. The records indicate that Plaintiff was given sheets, hygiene materials except for a toothbrush and one blanket on April 2, 1997. The records also indicate that Plaintiff was given towels on April 3, 1997. Plaintiff alleges that this is the first time that he was given a towel. Plaintiff does not dispute that he was given normal RHU issue at this time. See Plaintiff's Deposition at 18-19.

Plaintiff alleges that he was not permitted to shower until April 3, 1997. The RHU records provided to the Court by Plaintiff indicate that Plaintiff declined showers on March 23, 1997 during the 6 a.m. to 2 p.m. shift and March 25, 1997 during

the 6 a.m. to 2 p.m. shift.

Plaintiff also alleges that there was no water in his cell for "several days." Plaintiff's deposition describes the time period that he was without running water as "more than a week." Plaintiff's Deposition at 10. Plaintiff admits that he was given water when he asked for it "sometimes." Plaintiff's Deposition at 10. Plaintiff also admits that water was turned on, although not for the first few days, so that he could flush the toilet and wash his face, but alleges that this was only done approximately every other day. Plaintiff's Deposition at 10-11.

Plaintiff also alleges that he was not permitted to go out into the yard to exercise. Plaintiff's Deposition at 11. However, the RHU records provided to the Court by the Plaintiff indicate that Plaintiff refused offers to go to the yard on March 22, 1997 during the 6 a.m. to 2 p.m. shift, March 23, 1997 during the 6 a.m. to 2 p.m. shift, March 26, 1997 during the 6 a.m. to 2 p.m. shift, April 2, 1997 during the 6 a.m. to 2 p.m. shift, April 3, 1997 during the 6 a.m. to 2 p.m. shift, and April 4, 1997 during the 6 a.m. to 2 p.m. shift. In a document entitled "Sworn Affidavit of Julius Castro" which was filed with the Court on October 22, 1998, more than a month after the deadline set by the Court for Plaintiff to respond to defendant's summary judgement motion, Plaintiff for the first time alleges that he was unable to exercise during the period at issue because he did

not have any clothing.

Finally, Plaintiff alleges that his cell was without proper heat. This allegation was not made in Plaintiff's complaint. In fact, the allegation was first made in an affidavit filed by Plaintiff on September 18, 1998. The affidavit alleges that there was no heat in the cell and that it was "very cold" in the cell because it was "wintertime." In both his "Statement of Claims" filed September 18, 1998 and his "Plaintiff's Objection to the Defendant's Motion for Summary Judgement" filed September 28, 1998, Plaintiff alleges that Captain Larady knew or should have known that the allegedly unconstitutional conditions, including the lack of heat in his cell, would cause Plaintiff to suffer and that Plaintiff suffered injury as a result of those conditions. Plaintiff has made no allegation in this regard against any named defendant in this action.

As a result of these allegedly unconstitutional conditions, Plaintiff alleges that he suffered headaches, physical pain, emotional distress, mental anguish, anxiety, loss of sleep, shock, trauma, humiliation, fear, trepidation, and intimidation. Plaintiff also alleges that he tried to commit suicide in his cell because he could not sleep due to the low temperature in the cell and the lack of clothing and bedding. See Plaintiff's Affidavit filed September 18, 1998. Plaintiff also alleges that he was made ill from the lack of heat, clothing and bedding in

his cell and was given medication for this. Id.

III. DISCUSSION

A plaintiff asserting a cruel and unusual punishment claim must satisfy both parts of the two-prong test set forth by the United States Supreme Court in Wilson v. Seiter, 501 U.S. 294, 297 (1991). The first prong is an objective inquiry into whether the inmate was deprived of "the minimum civilized measure of life's necessities." Id. at 298. "No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from evolving standards of decency that mark the progress of a maturing society.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion)). At a minimum, correctional institutions must provide inmates with "adequate food, clothing, shelter, sanitation, medical care, and personal safety." Young v. Quinlan, 960 F.2d 351, 364 (3d Cir. 1992). The Court must consider whether the condition about which the inmate complains is sufficiently serious, that it is "so grave that it violates contemporary standards of decency." Helling v. McKinney, 509 U.S. 25, 36 (1993). The Supreme Court has made clear that "the Constitution does not mandate comfortable prisons, and prisons ... which house persons convicted of serious crimes [] cannot be free of

discomfort." Rhodes, 452 U.S. at 349. As the Supreme Court has stated, "extreme deprivations are required to make out a conditions-of-confinement claim ... [b]ecause routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society.'" Hudson v. McMillian, 503 U.S. 1, 9 (1992) (quoting Rhodes, 452 U.S. at 347). To violate the Eighth Amendment, conditions of confinement must be dangerous, intolerable or shockingly substandard. See Riley v. Jeffes, 777 F.2d 143, 147 (3d Cir. 1985); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 757 (3d Cir. 1979).

Conditions must be evaluated independently unless they have a mutually enforcing effect. Wilson, 501 U.S. at 304. The Supreme Court recognized that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise -- for example, a low cell temperature at night combined with a failure to issue blankets." Id.

In determining whether or not an inmate has been deprived of the minimum civilized measure of life's necessities, the Court may consider the duration of the deprivation experienced by the prisoner. See Hoptowit v. Ray, 682 F.2d 1237, 1258 (9th Cir. 1982) (citing Hutto v. Finney, 437 U.S. 678, 685 (1978) ("[I]n

considering whether a prisoner has been deprived of his rights, courts may consider the length of time that the prisoner must go without these benefits. The longer the prisoner is without such benefits, the closer it becomes to being an unwarranted infliction of pain." (internal citations omitted)).

The second prong is a subjective inquiry that requires the plaintiff to demonstrate that the prison officials acted with deliberate indifference. Wilson, 501 U.S. at 303. Defining deliberate indifference in the context of a Bivens action, the Supreme Court in Farmer v. Brennan, 511 U.S. 825 (1994), held that 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." Id. at 837.

"[T]he mere fact that a defendant is in a supervisory position is insufficient to find him liable as there is no respondeat superior liability in § 1983 cases." Crager v. Pennsylvania Dep't of Corrections, No. CIV. A. 92-3705, 1992 WL 168091 at *2 (E.D.Pa. July 10, 1992) (citing Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976)); see also Parratt v. Taylor, 451 U.S. 527, 537 n. 3 (1981); Polk

County v. Dodson, 454 U.S. 312, 325 (1981). The Court of Appeals for the Third Circuit has held that to be liable in § 1983 cases a defendant must be personally involved in the allegedly wrongful conduct. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity." Id. at 1207. See also Saunders v. Horn, 959 F. Supp. 689, 693 (E.D.Pa. 1996).

Accepting as true Plaintiff's allegations that he was provided only a paper gown for clothing and was not provided a mattress, blanket or hygiene items when he was first placed in the RHU cell on March 21, 1997, it is clear to this Court that under the two-part test set forth by the Supreme Court in Wilson that even if Plaintiff can demonstrate that the initial denial of these items rose to the level of a constitutional violation, Plaintiff cannot demonstrate that the removal or withholding of these items at the direction of the MHU staff was a violation of his constitutional rights by prison officials. The records provided to the Court by Plaintiff demonstrate that MHU personnel directed the RHU staff to remove all items from Plaintiff's cell on March 23, 1997 as a precautionary measure. This directive specifically included clothing and his mattress. Further, the

letter indicated that Plaintiff could be provided with only a paper gown. Additional records provided to the Court by Plaintiff indicate that normal RHU materials, including mattress, blankets, sheets, clothing and sanitary items were gradually returned to Plaintiff by April 3, 1998 at the direction of the MHU staff.

Whether or not the actions of the MHU staff in directing that Plaintiff be left without a blanket, mattress, sheets, towels and hygiene items could give rise to a claim by Plaintiff is not an issue before the Court. No members of the MHU staff are named as defendants in this action. However, the Court finds it hard to imagine that Plaintiff could be able to make out a deliberate indifference claim against members of the MHU staff in light of Plaintiff's history of multiple recent suicide attempts.

As discussed above, the deliberate indifference standard requires that the prison official be subjectively aware of the risk of harm to the Plaintiff and take no action to remedy that harm. The official must know of and disregard an excessive risk to inmate health or safety. Brennan, 511 U.S. at 837. In light of Plaintiff's history of recent suicide attempts, one of which came while Plaintiff was in the RHU during the period at issue, this Court is unable to find that the named prison officials were deliberately indifferent to Plaintiff's welfare when they followed the directives of the MHU staff concerning the materials

Plaintiff was permitted to have in his cell. Therefore, the Court finds that there is no genuine issue of material fact as to the deprivation of the listed materials at the direction of the MHU staff and Defendants are entitled to judgment as a matter of law on those claims. The Court will grant summary judgement for the Defendant on Plaintiff's claims that he was deprived of clothing, blankets, a mattress, and personal hygiene items during the period where prison staff were acting at the direction of the MHU staff.

In determining whether or not deprivation of clothing and hygiene materials constitutes a violation of Plaintiff's constitutional rights by Defendants, the Court will next address the period of time where the alleged deprivation of these items was not at the direction of prison psychiatric staff. The Court will also, of course, address Plaintiff's other claims that he was placed in a "dry cell" which was inadequately heated and was denied the right to shower and exercise. There is no suggestion in the record before this Court that any of these conditions, if they were imposed, were imposed at the direction of MHU staff. Each of Plaintiff's allegations will be addressed in turn.

First, Plaintiff alleges that he was forced to undergo a strip search when he arrived on the RHU on March 21, 1997. This is clearly not a violation of the Eighth Amendment. Plaintiff has not alleged that excessive force was used or that he suffered

any injury. See Gutridge v. Chesney, No. Civ. A. 97-3441, 1998 WL 248913 at *1 (E.D.Pa. May 8, 1998). To the extent that Plaintiff may be alleging that the routine strip search violated his Fourth Amendment rights, this claim is without merit. Inmates have no right to be free of routine strip searches or even visual body cavity searches as long as the search is conducted in a reasonable manner. See Bell v. Wolfish, 441 U.S. 520, 558-60 (1979); Wilson v. Shannon, 982 F. Supp. 337, 339 (E.D.Pa. 1997).

Second, Plaintiff alleges that he was not given a mattress or a blanket when he was placed on the RHU on March 21, 1997. However, Plaintiff has provided the Court with RHU records which indicate that Plaintiff was given a blanket and mattress upon his arrival on the RHU on March 21, 1997. Because Plaintiff has provided these records to the Court as part of his response to Defendants' summary judgement motion, the Court has determined that there is no issue of material fact as to whether or not Plaintiff was given a blanket and a mattress at the time of his arrival at Frackville on March 21, 1997.

The Court also finds that Plaintiff's allegation that he was deprived of a mattress and blanket for a period of two days, even if proved, would not rise to the level of a constitutional violation. See Gutridge v. Chesney, No. Civ. A. 97-3441, 1998 WL 248913 at *1 (E.D.Pa. May 8, 1998) (failure to provide blanket

for a month and a half from mid-April until early June was not constitutional violation); Collins v. Klotz, No. Civ. A. 92-3772, 1994 WL 371479 at *5 (E.D.Pa. June 24, 1994) (temporary denial of a bed does not threaten the life or health of the inmate so does not rise to the level of a constitutional violation); cf. Wright v. McMann, 460 F.2d 126, 129 (2d Cir. 1972) (holding inmate for eleven days one year and twenty-one days the next year in cell totally without bedding so that inmate was forced to sleep on concrete floor was a violation of the Eighth Amendment). The Court finds that the deprivation of these items for such a short period of time, although uncomfortable for Plaintiff, is not sufficient to constitute "wanton and unnecessary infliction of pain." Rhodes, 452 U.S. at 347.

Third, Plaintiff alleges that he was placed in a "dry cell" without running water for "several days." Plaintiff's Deposition describes the time period that he was without running water as "more than a week." Plaintiff's Deposition at 10. However, Plaintiff admits that he was given water when he asked for it "sometimes." Id. Plaintiff also admits that water was turned on, although he claims it was not for the first few days, so that he could flush the toilet and wash his face, but alleges that this was only done approximately every other day. Id. at 10-11.

Although the Court recognizes that being deprived of water to wash with and without the use of a functioning toilet for

several days could rise to the level of a constitutional violation, the Court finds that Plaintiff has failed to make sufficiently specific allegations to reach that level here. Plaintiff, in his deposition, admits that he was given water to drink and wash in and also admits that he was permitted to flush the toilet. It is the deprivation of water for drinking and washing, as well as the use of toilet facilities, that courts have found to violate the Eighth Amendment. See, e.g. Young v. Quinlan, 960 F.2d 351 (3d Cir. 1992) (finding constitutional violation where inmate was placed in cell without a toilet or running water for 96 hours, was forced to relieve himself on the floor of his cell, and was not permitted water to wash with or toilet paper during that time); Williams v. Adams, 935 F.2d 960, 961 (8th Cir. 1991) (summary judgment for defendants improper where inmate spent thirteen days in cell without working toilet and the toilet overran and spilled waste onto the floor).

The mere fact that the water in Plaintiff's cell was turned off for a period of days, without more, even if proved by Plaintiff is not sufficient to rise to the level of a constitutional violation. See Stewart v. Wright, 1996 WL 665978 at * 1-2 (7th Cir. 1996) ("Dry cell conditions such as not being able to flush the toilet or brush teeth are mere inconveniences....[I]t is well settled that conditions which are temporary and do not result in physical harm are not actionable

under the Eighth Amendment."); Calhoun v. Wagner, Nos. Civ. A. 93-4075, 93-4122, 1997 WL 400043 (E.D.Pa. July 14, 1997) (no constitutional violation where cell was without water for 61 hours but inmate was provided fluids three times a day). The Court therefore finds that Plaintiff has failed to allege a constitutional violation regarding the lack of running water in his cell.

Fourth, Plaintiff alleges that he was not given various hygiene items when he was initially placed on the RHU on March 21, 1997. The records provided to the Court by Plaintiff indicate that Plaintiff was eventually given these items, after Dr. Pascal's directive of April 2, 1997. The records also indicate that Plaintiff was given a roll of toilet paper on March 26, 1997. Further, Plaintiff admits in his deposition that he was given toilet paper prior to that by prison officials "once in a while" when he asked for it. Plaintiff's Deposition at 22.

The deprivation of personal hygiene items can be sufficient to make out a constitutional violation based upon the extent of the violation and the nature of the items withheld. See, e.g. Carver v. Bunch, 946 F.2d 451, 452 (6th Cir. 1991); Chandler v. Baird, 926 F.2d 1057, 1064-65 (11th Cir. 1991). The denial of toilet paper for a few days is not sufficient to state a constitutional violation. See Harris v. Fleming, 839 F.2d 1232, 1235-36 (7th Cir. 1988) (not providing toilet paper for five days

was not an Eighth Amendment violation); Briggs v. Heidlebaugh, No. Civ. A. 96-3884, 1997 WL 318081 at *2 (E.D.Pa. May 21, 1997) (denial of toilet paper for two days does not infringe on prisoner's constitutional rights). However, the combination of a lack of toilet paper and the lack of the water in the cell for flushing the toilet and washing could rise to the level of a constitutional violation as it did in Young. Here, Plaintiff has admitted in his deposition that he was not really without running water and toilet paper for several days, but only that these items were not available at all times and that he had to ask in order for these items to be provided. Therefore, under the circumstances, the Court finds that the deprivation of toilet paper alleged by Plaintiff does not rise to the level of a constitutional violation.

Plaintiff also alleges that he was not provided with towels, soap, a toothbrush or toothpaste for several days. The deprivation of hygiene items, particularly soap and a toothbrush, can rise to the level of a constitutional violation. See McCray v. Burrell, 516 F.2d 357, 367 (4th Cir. 1975) (soap and a toothbrush as "essential articles of hygiene"). Here, however, the Court finds that the deprivation of these items for the two-day period at issue was not sufficiently serious to rise to the level of a constitutional violation. See Matthews v. Murphy, No. 90-35458, 1992 WL 33902 at *4 (9th Cir. Feb. 25, 1992) (no

Eighth Amendment violation where inmate was deprived of towel, toothbrush, toothpaste, and soap for thirty-four days); Harris v. Fleming, 839 F.2d 1232, 1235-36 (7th Cir. 1988) (no constitutional violation where inmate not given soap, toothpaste, or toothbrush for 10 days). Plaintiff has not alleged any specific harm that resulted from the deprivation of these items. Cf. Penrod v. Zavaras, 94 F.3d 1399, 1406 (10th Cir. 1996) (denial of toothpaste could rise to level of constitutional violation where plaintiff had to be treated by a dentist for bleeding and receding gums and tooth decay).

Fifth, Plaintiff alleges that his cell was without proper heat. Initially, the Court notes that this allegation was not made in Plaintiff's complaint. This allegation was made for the first time in Plaintiff's affidavit in response to Defendants' summary judgement motion. Although the allegation concerning inadequate heat is not properly before the Court, having not been pled by Plaintiff and Defendants have not had an opportunity to respond, the Court will nonetheless address Plaintiff's claim because Plaintiff is pro se and his pleadings must be liberally construed. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

The lack of adequate heat can give rise to a constitutional violation. See Dixon v. Godinez, 114 F.3d 640 (7th Cir. 1997) (summary judgment improper when inmate alleged that ice formed on cell walls during winter for several years as a result of

inadequate heating); Chandler v. Baird, 926 F.2d 1057, 1064-1066 (11th Cir. 1991) (reviewing cases from several circuits where inadequate heat, combined with other conditions, were found to state constitutional violations). However, in addition to not making this allegation in a timely fashion, Plaintiff has made no specific allegation regarding the temperature in his cell. Plaintiff has also made only general allegations regarding harm that he suffered as a result of the lack of heat.

Plaintiff alleges in his affidavit that he attempted suicide in his cell because he was so cold and could not sleep. The Court initially notes that in Plaintiff's deposition he says that he often sometimes through meals during the period he was on the RHU because of the psychiatric medication he was on. See Plaintiff's Deposition at 12. The RHU records provided to the Court by Plaintiff indicate that Plaintiff was already on medication when he was placed on the MHU on March 21, 1997.

Although Plaintiff's affidavit makes no allegation of when these cold temperatures occurred, the records provided to the Court by Plaintiff indicate that the suicide attempt which Plaintiff refers to occurred on March 23, 1997. However, the Court will address Plaintiff's allegation, again construing his statements liberally because he is proceeding pro se, as if Plaintiff alleged that his cell was inadequately heated during the entire two-week period Initially, the Court takes judicial

notice that the low temperature in the area around Frackville dipped below freezing on the evenings of March 21, March 23, March 24, March 25, and March 27, 1997. See Northeast Regional Climate Center Climate Data Reports from Hamburg, Pennsylvania. If the cell was improperly heated as Plaintiff alleges, the Court finds that these temperatures could rise to the level of a constitutional violation if Plaintiff was not provided an adequate blanket or clothing with which to keep warm. See Dixon, 114 F.3d at 643-44. The Court has already determined that Plaintiff was only without a blanket during the night of March 23, 1997 when his blanket was removed at the direction of the MHU staff.

Although Plaintiff is not required to "become deathly ill before a constitutional violation will be found, 'the absence of any ailment other than colds or sore throats militates against characterizing the conditions in [plaintiff's] cell as objectively serious.'" Rambert v. Horn, No. Civ. A. 96-2875, 1996 WL 583155 at *3 (E.D.Pa. Oct. 11, 1996) (quoting Benson v. Godinez, 919 F. Supp. 285, 289 (N.D. Ill. 1996). See United States ex rel. Bracey v. Rundle, 368 F. Supp. 1186, 1191 (E.D.Pa. 1973) (cold temperature insufficient to constitute cruel and unusual punishment). The Plaintiff, in his affidavit, also alleges that he was made ill by the cold temperature and placed on medication. Although Plaintiff has once again failed to

provide the Court with any support for this bald assertion, such as what the nature of his illness was or when this occurred, the Court will accept this allegation as true because it was made in a sworn affidavit.

The Court finds that, under the circumstances, the cold temperatures alleged by Plaintiff could pose a risk of harm to Plaintiff "so serious that society is unwilling to tolerate it." Rambert, 1996 WL 583155 at *2 (citing Helling, 590 U.S. at 35). Although the Court has found that Plaintiff was provided a blanket throughout that period, except as noted above, there is still a genuine issue of material fact as to whether or not that blanket provided adequate protection against the cold temperatures.

Sixth, Plaintiff alleges that he was not permitted to shower for "several days." The RHU records provided to the Court by Plaintiff demonstrate that Plaintiff refused showers on several occasions during the two-week period at issue. The Court therefore finds that there is no genuine issue of material fact as to the denial of showers to Plaintiff.

The Court also finds that Plaintiff's allegation that he was denied showers for several days, even if proved, would not rise to the level of a constitutional violation. See Briggs, 1997 WL 318081 at * 3 (denial of shower for two weeks was not constitutional violation); DiFilippo v. Vaughn, No. Civ. A. 95-

909, 1996 WL 355336 at *5 (E.D.Pa. June 24, 1996) (the Eighth Amendment does not require that inmates be given frequent showers or comfortable showers); Tinsley v. Vaughn, No. Civ. A. 90-0113, 1991 WL 95323 at *4 (E.D.Pa. May 29, 1991) (no violation when shower privileges suspended for twelve days).

Seventh, Plaintiff alleges that he was not permitted to leave his cell go into the yard for exercise for "several days." The RHU records provided to the Court by Plaintiff demonstrate that Plaintiff refused opportunities to go into the yard on several occasions during the two-week period at issue. Therefore, the Court finds that there is no genuine issue of material fact as to any alleged constitutional violation resulting from not permitting Plaintiff to go into the yard.

The Court also finds that Plaintiff's allegations that he was deprived of the opportunity to exercise for "several days," even if proved, would not rise to the level of a constitutional violation. See, e.g. French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985), cert. denied, 479 U.S. 817 (1986) (lack of exercise states a constitutional violation where "movement is denied and muscles are allowed to atrophy, [and] the health of the individual is threatened"); Bensinger v. Capt. 2 to 10:00 on Feb. 18, 94, No. Civ. A. 94-1532, 1995 WL 30609 at *2 (E.D.Pa. Jan. 18, 1995) (denial of exercise for four days was not a constitutional violation in the absence of allegations of

resulting harm). Deprivation of exercise can rise to the level of a constitutional violation when it occurs for a prolonged period of time and the plaintiff can demonstrate a tangible physical harm which resulted from the denial of exercise. Neither of those elements are present here.

Finally, Plaintiff alleges that he was deprived of clothing and given only a paper gown to wear when he was placed in the RHU. Plaintiff further alleges that prison officials did not give him socks and underwear, even though Dr. Pascal indicated that he was permitted to have them on March 26, 1997. Plaintiff does not specify exactly when he was given socks and underwear, but in his deposition he agrees that he was eventually given all the normal RHU issue in accordance with Dr. Pascal's directive of April 2, 1997. Plaintiff's Deposition at 18-19. For the purposes of this motion, therefore, the Court will consider the Plaintiff's allegation to be that he was deprived of socks and underwear from March 21, 1997 to March 23, 1997 and from March 26, 1997 to April 3, 1997 when the records indicate that a jumpsuit was offered to Plaintiff and he declined it.

The Court finds that Plaintiff's allegations that he was denied proper clothing are not sufficient to state a constitutional violation. The Court finds that placing Plaintiff in a paper gown rather than a prison-issued jumpsuit, although it may have been unpleasant for Plaintiff, does not rise to the

level of a constitutional violation. The Court also finds that denial of socks and underwear for a few days does not rise to the level of a constitutional violation. See DiFilippo, 1996 WL 355336 at *5 (denial of clean underwear for twenty days not a constitutional violation). While prisons are certainly required to provide inmates with adequate clothing, see Young, 960 F.2d at 364; Chandler, 926 F.2d at 1063 (keeping inmate in cold cell with only undershorts for clothing could be constitutional violation), no specific items of clothing are constitutionally required.

Having addressed whether or not each allegation by Plaintiff is sufficiently serious to set forth a constitutional violation under the first prong of the Wilson v. Seiter test, the Court must next address whether or not the second prong of the test is met, that is whether or not the named defendants were "deliberately indifferent" to the danger of harm to Plaintiff. For the reasons stated below, the Court finds that, even if Plaintiff's allegations were found to state constitutional violations, he cannot show that Defendants Chesney and Shannon were deliberately indifferent to the threat of harm to Plaintiff because they were not personally involved in any of the alleged violations. The Court also finds that even if Plaintiff were permitted to amend his complaint to name Lieutenant Novitsky and Captain Larady as defendants, Plaintiff would be unable to demonstrate that they were deliberately indifferent to the threat

of harm to Plaintiff under the circumstances.

As an initial matter, the Court notes that conditions which may otherwise be found to violate the Eighth Amendment may be constitutionally permissible when prison officials act out of a concern for the safety and well-being of the inmate. See McMahon v. Beard, 583 F.2d 172, 175 (5th Cir. 1978) (no constitutional violation in holding pretrial detainee without clothes other than paper gown, mattress, sheets or blankets for three months where staff concerned over inmate's continuing suicidal tendencies and where inmate monitored by medical staff); McCray v. Burrell, 516 F.2d 357, 365-369 (4th Cir. 1975) (conditions which could otherwise violate the Eighth Amendment, such as no blanket in cold cell, no mattress, no clothing and no hygiene items, could be justified where there was such mental derangement on the part of the inmate that self-harm was a real danger and a mental health professional was contacted). There is no question here that prison staff had reason to be concerned about Plaintiff's well-being. The records indicate that the personnel who admitted Plaintiff to the RHU on March 21, 1997 had him seen that night by a member of the MHU staff. Plaintiff had previously attempted suicide at Frackville in approximately February, 1997. See Plaintiff's Deposition at 20. Plaintiff also tried to commit suicide while in the RHU on March 23, 1997 by slitting his wrists. In addition, according to Plaintiff's Motion for

Appointment of Counsel filed with the Court on September 18, 1998, Plaintiff has a history of mental illness which has resulted in prior hospitalizations and suicide attempts by hanging, hunger strike, self-mutilation and drug overdose.

The Court begins by noting that Plaintiff's allegations against Defendants Chesney and Shannon are not based on any direct contact that they had with him during the period at issue. It is well established that mere supervisory responsibility is not sufficient for liability under § 1983. See, e.g. Polk County, 454 U.S. at 325; Parratt, 451 U.S. at 537 n.3. Rather, personal involvement in the allegedly unconstitutional activities is required. See Rode, 845 F.2d at 1207.

Plaintiff alleges that Defendants Chesney and Shannon failed to adequately train the staff to treat the prisoners in a constitutionally sufficient manner. The necessary personal involvement by a supervisor can be alleged, if done with sufficient particularity, through claims that the defendant acquiesced in the unconstitutional activity of another or that the defendant directed another to act unconstitutionally. See Rode, 845 F.2d at 1207. Supervisory individuals may also be held liable under § 1983 for failure to train or supervise if their actions constitute deliberate indifference to the plaintiff's rights and are the proximate cause of the plaintiff's injuries. See City of Canton v. Harris, 489 U.S. 378 (1989); Sample v.

Diecks, 885 F.2d 1099 (3d Cir. 1989).

Plaintiff has not brought forth any evidence to suggest that Defendants Chesney or Shannon were aware of the allegedly unconstitutional conditions or that Defendants were deliberately blind to the conditions. In fact, Plaintiff has only raised any question as to whether or not he sought to notify supervisory prison officials of his allegedly unconstitutional conditions on one occasion. In the form initially completed by Plaintiff for the purpose of filing his complaint, in response to questions concerning administrative procedures he used to resolve the issues raised in his complaint, Plaintiff answered that he "placed numerous grievance forms with the c/o staff in the RHU..." (Document No. 6 at 3). Plaintiff has made no mention of any grievance forms in any of his other pleadings, nor does he make any specific allegations that Defendants Chesney and Shannon knew of the allegedly unconstitutional conditions. In fact, when Plaintiff was asked at his deposition why he sued Defendants Chesney and Shannon, Plaintiff indicated that he did so because "Mookie," another inmate who was assisting Plaintiff in the preparation of his legal documents, told him that these defendants should be sued because they were the ones in charge. See Plaintiff's deposition at 15-16. From the bare one-time assertion that he filled out a grievance form, without any specifics as to when this occurred and whether or not that

grievance concerned the allegations at issue, the Court is unable to find that Defendants Chesney and Shannon knew or should have known of the alleged threat of harm to Plaintiff.

Plaintiff has also not brought forth any evidence that there was any policy in place that led to Plaintiff being placed in the allegedly unconstitutional conditions. Plaintiff has also failed to make any sufficiently specific allegations that any prison officials under the direction of Defendants were trained or directed to act in an unconstitutional manner towards inmates such as Plaintiff.

For the reasons stated above, the Court will grant summary judgement for Defendants Chesney and Shannon on the basis that Plaintiff has failed to create a genuine issue of material fact that they were deliberately indifferent to Plaintiff's welfare. The Court finds that they are therefore entitled to judgement as a matter of law.

Although Captain Larady and Lieutenant Novitsky are not currently named as a defendant in this action, Plaintiff's request to amend his complaint to identify Lt. John Doe as Lieutenant Novitsky and add Captain Larady as a defendant is currently pending before this Court. The Court addresses the claims against these officers here. Plaintiff's allegation against Lieutenant Novitsky is that he was responsible for the strip search of Plaintiff and for placing Plaintiff in the dry

cell without bedding and wearing only a paper gown when he arrived at the RHU. Plaintiff, in the Statement of Claims he filed in response to Defendants' summary judgement motion, alleges that he asked Captain Larady, as a duty officer of the RHU, to provide him with adequate bedding, toilet paper and water but that he refused to provide these items to Plaintiff for several days. Plaintiff also alleges that Captain Larady "knew or should have known" that Plaintiff would suffer harm from, among other things, the lack of heat in Plaintiff's cell.

The Court finds that, given Plaintiff's history of suicide attempts, Plaintiff is unable to create a genuine issue of material fact as to whether or not Lieutenant Novitsky and Captain Larady were deliberately indifferent to the threat of harm to Plaintiff. This Court finds, in the absence of proof by Plaintiff that any of the defendants acted with animosity towards Plaintiff, that Plaintiff cannot meet his burden of showing "deliberate indifference" on the part of the officers. The Court finds it impossible to hold these officers responsible for withholding clothing and toiletries from Plaintiff and limiting the running water in Plaintiff's cell, if they in fact did so, for a period of two days. As noted above, conditions that could otherwise rise to the level of a constitutional violation may be permitted when they exist out of concern for the safety of the inmate.

The Court also finds that there is no genuine issue of material fact as to the deliberate indifference of these officers regarding the alleged lack of heat in Plaintiff's cell. Plaintiff makes no allegation that he complained to Captain Larady or Lieutenant Novitsky about being cold. He makes no allegation that he informed any member of the prison staff that his cell was inadequately heated. The Court finds this case distinguishable from the situation in Dixon where the prison staff clearly had notice of the heating problem because ice formed on the walls of the plaintiff's cell for months at a time. Here, Plaintiff has made no specific allegations and provided no other information to suggest that the two officers Plaintiff wishes to name as defendants had any knew of and disregarded a serious risk of harm to Plaintiff. The fact that Plaintiff admits in his deposition that he slept so much that he sometimes slept through meals also suggests that the officers had no reason to know that Plaintiff was allegedly suffering extreme discomfort from the cold in his cell. See Plaintiff's Deposition at 12. The Court has also already found that Plaintiff was provided with a blanket throughout the period at issue, except for the night of March 23, 1997 where the blanket was taken away at the direction of the MHU staff.

Therefore, the Court finds that, under the circumstances, there are no facts that Plaintiff could bring forth which would

create a genuine issue of material fact as to whether or not Plaintiff's constitutional rights were violated by Lieutenant Novitsky and Captain Larady. For this reason, the Court will deny Plaintiff's request to amend his complaint to name these officers as defendants.

The Court finds that Plaintiff, in response to Defendants' motion for summary judgement, has not come forward with any affidavits, answers to interrogatories, admissions, or depositions that raise any genuine issue of material fact. Therefore, this Court must grant Defendants judgment as a matter of law.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF PENNSYLVANIA

JULIUS CASTRO	**CIVIL ACTION**
Plaintiff,	**NO. 97-4983**
v.	
JOSEPH E. CHESNEY;	
ROBERT SHANNON;	
LT. JOHN DOE	
Defendants.	

ORDER

AND NOW, this 3rd day of November, 1998; Defendants Chesney and Shannon having filed a motion for summary judgement and Plaintiff having filed responses thereto; for the reasons stated in this Court's Memorandum of November 3, 1998, the Court having determined that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law;

IT IS ORDERED that Defendants' Motion for Summary Judgement is **GRANTED**.

RAYMOND J. BRODERICK, J.