

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MOHAMED A. EL-TABECH,)	
)	Case No.: 4:04CV3231
Plaintiff,)	
)	
v.)	BRIEF IN SUPPORT OF PLAINTIFF'S
)	MOTION FOR CONTEMPT
HAROLD W. CLARKE, ET AL.)	
)	
Defendants.)	
)	

INTRODUCTION

Throughout this litigation, the Defendants have waged a war of “unrelenting resistance” against El-Tabech’s religious freedoms. (Mem. and Order, Filing No. 203 at 5, May 5, 2008.) Even after the Court’s entry of judgment in El-Tabech’s favor, the Defendants have continued a steadily escalating campaign in opposition to the requirements of this Court’s orders. The Defendants’ recalcitrance peaked when TSCI staff served El-Tabech a “kosher” meal in which feces was hidden.

Shortly after the Court issued its July 2007 order, some TSCI staff members began verbally taunting El-Tabech about his prayer schedule and diet. The insults grew to ignoring the posted prayer schedule and intentionally interrupting El-Tabech’s prayers for no apparent reason.¹ The prayer schedule has been ripped from the wall and Defendants have often times refused to re-post it. Despite the Defendants’ pledge “to never serve Mr. El-Tabech non-kosher food,” TSCI staff have often refused to follow even basic provisions of the kosher process and protocols previously agreed to by the parties and the Court. On numerous occasions, El-Tabech has found non-kosher foreign materials like hair, plastic, non-kosher foods, and non-kosher kitchen utensils in his food and

¹ Since September 2007, TSCI staff members have disrupted El-Tabech’s daily prayers 139 times, and 27 times during May 2008 alone.

Defendants have failed to follow their own basic food safety transportation requirements with respect to El-Tabech's kosher meals.² Between October 17, 2007 and April 29, 2008, Plaintiff's attorneys contacted the Defendants' counsel on at least 20 separate occasions in an attempt to convince the Defendants to adhere to the kosher protocols and prayer schedule as required by the Court. See, T. Lane Aff., Pl.'s Ex. 2 ¶¶ 4 - 28. These efforts were unsuccessful. Since the Defendants will not willingly comply with the orders of this Court, Plaintiff has been left with no other alternative but to file this Motion for Contempt.

STATEMENT OF FACTS

On July 17, 2007, this Court found that Defendants had violated El-Tabech's civil rights under the Religious Land Use and Incarcerated Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc et seq., and the First Amendment of the United States Constitution. (Mem. and Order, Filing No. 179 at 5-6, July 17, 2007.) As a result, Defendants were ordered to (1) provide El-Tabech with a "nutritionally-sufficient kosher diet, in accordance with Nebraska Department of Corrections Services policies and procedures" (Order, Filing No. 190 at ¶ 1, Oct. 5, 2007), and (2) post El-Tabech's prayer schedule so "guards can adjust activities or reduce disturbances as appropriate" (Mem. and Order, Filing No. 179 at 6). The Defendants have refused to abide by these two clear and relatively simple requirements.

The Kosher Protocols. This Court ordered Defendants to provide El-Tabech with a "nutritionally-sufficient kosher diet." (Order, Filing No. 190, at ¶ 1.) At the Court's direction, El-

² When El-Tabech has complained about staff members' repeated violation of this Court's Orders, TSCI staff have responded with comments like, "[w]rite the Goddamn judge, write a grievance to the damn judge who don't know what is going on"; "[f]uck [El-Tabech], he should be getting the same thing like everybody else"; and "I don't care about Jesus – why would I care about a Muslim?" (M.El-Tabech Aff., Pl.'s Ex. 1 at ¶ 11.)

Tabech and the Defendants drafted a joint stipulation which set forth the manner in which the Defendants' would provide El-Tabech with kosher meals. (Joint Stip. on Feasibility of Defs.' Proposed Kosher Diet Option, Filing No. 187, Sept. 21, 2007; Kosher Equip. and Meal Preparation Process, Filing No. 187-2 at 1-3, Sept. 21, 2007 (the "Kosher Process").) As part of this stipulation, the Defendants promised that they "would never serve Mr. El-Tabech non-kosher food." (Kosher Process, Filing No. 187-2 at 1.) Two operational protocols were developed for use by TSCI staff to prepare bulk and individual kosher meals. (Tecumseh State Corr. Inst., Food Service Protocol 1.01: Kosher Meal Preparation Process (Bulk Preparation and Clean Up), Pl.'s Ex. 6 (2008) ("Kosher Protocol 1.01"); Tecumseh State Corr. Inst., Food Service Protocol 1.02: Kosher Meal Preparation Process (Individual Meal Preparation), Pl.'s Ex. 7 (2008) ("Kosher Protocol 1.02").) At El-Tabech's request, Rabbi Jonathan Gross, an orthodox rabbi and head of the Beth-Israel Synagogue in Omaha, Nebraska, reviewed the Kosher Process, the Kosher Protocols, and personally observed the preparation of a meal at Tecumseh State Correctional Institute ("TSCI"). (Letter from Rabbi Jonathan Gross, Beth Israel Synagogue, to Ted J. Lane, Attorney for Plaintiff, Pl.'s Ex. 8 (March 21, 2008).) Rabbi Gross stated that, "[a]s an orthodox rabbi, I affirm that the food prepared as prescribed by the protocol and based on my personal observations is kosher according to the highest standards." (Id. at 1 ¶ 1.)³

Defendants' Compliance with the Kosher Protocols. Although the Kosher Process and Protocols are sufficient to ensure that the food served El-Tabech is kosher, they are effective only if TSCI staff comply with their requirements. The most egregious violation of the process and

³ El-Tabech accepts the authority and opinion of Rabbi Gross, and does not allege that the Kosher Process or Kosher Protocols themselves are deficient. Rather, El-Tabech's concern stems only from the Defendants' refusal to abide by the previously agreed-to protocols.

protocol occurred on April 15, 2008, when El-Tabech was served a meal which contained human excrement. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 12.) The feces was wrapped in plastic and partially covered by rice. (Id. at ¶ 15.) Corporal Hernandez observed El-Tabech open the meal and both he and Sergeant Ebke agreed that the object in El-Tabech’s food appeared to be feces. (Id. at ¶¶ 16–18.) El-Tabech requested that the guards photograph the clamshell container and its contents, and that the feces be preserved as evidence. (Id. at ¶¶ 19, 20.) Later the same day, El-Tabech’s counsel also contacted the Attorney General’s office and requested that Defendants preserve this evidence. (T. Lane Aff., Pl.’s Ex. 2 at ¶¶ 18, 35.) The Attorney General office agreed to preserve the evidence and test the feces to determine who was responsible for placing it in El-Tabech’s food. (T. Lane Aff., Pl.’s Ex. 2 at ¶¶ 35-36.) Despite these assurances, the State disposed of the excrement without, apparently, photographing the meal or undertaking any testing to determine its source. (T. Lane Aff., Pl.’s Ex. 2 at ¶ 39.) Defendants did not inform El-Tabech’s attorneys of this failure until two weeks later. (Id.)

El-Tabech has found other foreign objects in the kosher meals prepared by TSCI staff including hair, onion peels, plastic, and a thermometer. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 9(a).) El-Tabech has also received food prepared in violation of kosher law (vegetables cut with a knife) and non-kosher cereal in direct violation of kosher principles and the Protocols. (Id. at ¶ 9(c)-(d).) Each of these incidents was documented by El-Tabech in his Daily Meal Log. (Id. at ¶¶ 8-9, Ex. A.)

The Defendants have also ignored their own food service procedures with regard to the meals served to El-Tabech. TSCI Food Service procedures require transporting potentially-hazardous food in a temperature-controlled manner. (Tecumseh State Corr. Inst., Operational Mem. 108.01.01: Food Service: Safety and Sanitation, Pl.’s Ex. 3 at 12 ¶ XIII.C-D (2006).) Specifically, Operational

Memorandum 108.01.01 requires that “[p]otentially hazardous food requiring hot storage shall be transported at 135 degrees F[ahrenheit] or above” and “[p]otentially hazardous food requiring refrigeration during storage shall be transported at 35-40 degrees F[ahrenheit].” (*Id.*) Although it takes 25 minutes to deliver El-Tabech’s meals from the kitchen to his cell and hot and cold transport carts are used to deliver all the other meals to inmates of Gallery F, the Defendants have never used a hot or cold transport cart to deliver El-Tabech’s meals. (T. Lane Aff., Pl.’s Ex. 2 at ¶¶ 30, 32; M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 27.) The vegan entrées are often cold, and the milk warm, when served to El-Tabech. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 9(a)-(b).) Finally, although the kosher process and protocols call for “fresh” fruit and vegetables at designated meals, El-Tabech has been served rotten fruit and lettuce 63 times since November 2007. (*Id.* at ¶ 9(e); Religious Kosher Menu, Filing #187-2 at 6-7.)

As a result of all of these violations, El-Tabech can no longer reasonably trust that food prepared by TSCI staff in the TSCI kitchen is kosher and uncontaminated. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶¶ 22, 29.) Therefore, El-Tabech has been forced to supplement his diet with kosher food purchased from the TSCI canteen. (*Id.* at ¶ 10.) These purchases have totaled \$532.52. (*Id.*, Ex. B.)

Prayer Schedule and Disruptions. In its Memorandum and Order, the Court ordered Defendants to “post[] a prayer schedule so that guards are aware of it” and “adjust activities or reduce disturbances as appropriate.” (Mem. and Order, Filing No. 179 at 6.) The Court also stated that, because “prison security is a compelling state interest, . . . altering prison schedules to accommodate El-Tabech’s prayer schedule is not expected.” (*Id.*)

Beginning July 18, 2007, El-Tabech looked for a prayer schedule every time he was brought out of his cell onto the “F” Gallery for showers, yard time, and to fulfill his job duties as porter. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 31.) He also checked the Special Management Unit (“SMU”) entrance lobby each time he was escorted out of SMU to the law library or for a medical appointment. (Id. at ¶ 32.) Defendants did not post a prayer schedule in the SMU at TSCI until September 14, 2007. (Id. at ¶ 33.) The prayer schedule has been torn down by TSCI staff several times. (Id. at ¶ 33.)⁴ Often, the prayer schedule is not reposted for days or unless El-Tabech specifically requests that it be reposted. (Id.)

The prayer schedule cannot be read from El-Tabech’s cell door or anywhere else on the floor “F” Gallery. (Id. at ¶ 34.) The prayer schedule has never been posted inside the “F” Gallery of SMU or where it would be visible to someone approaching El-Tabech’s cell door. (Id.) Further, the prayer schedule is often out of date and does not provide accurate start times for El-Tabech’s daily prayers.⁵ (Id. at ¶ 35.) For example, the June 2008 prayer schedule was not posted until June 8, 2008, while the July 2008 prayer schedule was not posted until July 14, 2008. (Id.)

Since September 2007, TSCI staff have unnecessarily disrupted El-Tabech’s prayers 139 times, including 27 interruptions in May of 2008. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶¶ 36-41, Ex. F.) These disruptions have not occurred in order to adhere to the prison schedule, but instead involve unnecessary or routine requests that could be made at any time. (Id. at ¶ 39, Ex. F.)

⁴ Because the prayer schedule is posted in the SMU lobby, where inmates are not allowed unless shackled and under guard, El-Tabech assumes the TSCI staff have been responsible for the removal of the schedule. (Id. at ¶¶ 31–32.)

⁵ Islamic prayer times are based on the time of sunrise and sunset at a person’s specific location. For some prayers, the start time may change by as much as 30 minutes over the course of a single month. (See IslamicFinder.org, Prayer Times Schedule 2008 (Tecumseh, NE 68450, USA) (2007), Pl.’s Ex. 11.)

ARGUMENT

I. THE DEFENDANTS ARE IN VIOLATION OF THIS COURT’S PRIOR ORDERS IN THIS LITIGATION AND SHOULD BE HELD IN CONTEMPT OF COURT.

“A district court has inherent power to enforce compliance with its lawful orders and mandates by awarding civil contempt damages, including attorneys fees.” Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1340 (8th Cir. 1975). A finding of contempt must be based on a party’s failure to comply with a “clear and specific” underlying order. Chaganti & Assoc., P.C. v. Nowotny, 470 F.3d 1215, 1223 (8th Cir. 2006).⁶

Here, both of the Court’s underlying orders were clear and specific. First, the Court ordered Defendants to

implement the “Kosher Equipment and Meal Preparation Process” (the “Kosher Process”) in compliance with this Court’s July 17, 2007 Memorandum and Order to “provid[e] El-Tabech[,] and other prisoners similarly situated” who request a religious diet, with a nutritionally-sufficient kosher diet, in accordance with Nebraska Department of Corrections Services policies and procedures

(Order, Filing No. 190 at ¶ 1.) The language of this order is based on the language of the parties’ agreement and stipulation as filed with this Court. (See Joint Stip. on Feasibility of Defs.’ Proposed Kosher Diet Option, Filing 187.) The language of this order clearly delineates Defendants’ responsibilities and duties.

The Court also ordered clear and specific conduct with respect to El-Tabech’s daily Islamic prayers:

As to El-Tabech’s prayer request, the court finds that posting a prayer schedule so that the guards are aware of it is not an unreasonable accommodation. The court

⁶ A motion for civil contempt is properly brought as part of the underlying litigation that gave rise to the order that is being violated. See Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452 (1932) (noting that civil contempt proceeding is not to be regarded as an independent action, but as part of the original case).

orders that such a schedule should be posted with the understanding that the guards can adjust activities or reduce disturbances as appropriate. However, the court recognizes that prison security is a compelling state interest, and that altering prison schedules to accommodate El-Tabech's prayer schedule is not expected.

(Mem. and Order, Filing No. 179 at 6.) The language of this order clearly requires two specific activities: (1) posting a prayer schedule so that the guards are aware of El-Tabech's prayer times, and (2) "adjust[ing] activities or reduc[ing] disturbances," as appropriate, based on El-Tabech's prayer times, unless the altering of a prison schedule is required. The language of this order clearly delineates Defendants' responsibilities and duties.

"The party seeking a contempt order bears the burden of proving facts warranting such relief by clear and convincing evidence." Jake's, Ltd. v. City of Coates, 356 F.3d 896, 899-900 (8th Cir. 2004). The evidence here is clear and convincing, and establishes (1) that Defendants have failed to provide El-Tabech with a "nutritionally-sufficient kosher diet, in accordance with Nebraska Department of Corrections Services policies and procedures" by failing to properly implement the Kosher Process or adhere to the TSCI Food Service procedures, and (2) Defendants have failed to post a prayer schedule so that the guards can adjust activities or reduce disturbances, as shown by the constant and unnecessary disruption of El-Tabech's daily prayers. The Court has the power to enforce compliance with those orders via a contempt proceeding.

A. Defendants Have Failed to Provide a "Nutritionally-Sufficient Kosher Diet" to El-Tabech in Violation of this Court's Order.

Defendants have failed to provide El-Tabech with a "nutritionally-sufficient kosher diet, in accordance with Nebraska Department of Corrections Services policies and procedures." (Order, Filing No. 190 at ¶ 1). Defendants began providing El-Tabech with court-ordered "kosher meals" on October 30, 2007. (M. El-Tabech Aff., Pl.'s Ex. 1 at ¶ 7.) Under the Kosher Process and Kosher

Protocols, TSCI staff prepare and package the vegan entrées, vegetables (lettuce, carrots, celery), and bread. (Kosher Process, Filing No. 187-2 at 1-3; Kosher Protocol 1.01, Pl.’s Ex. 6 at 1–3; Kosher Protocol 1.02, Pl.’s Ex. 7 at 2 ¶ 2.) However, the Kosher Process and Kosher Protocols are not consistently followed, resulting in contamination of the food items prepared by TSCI staff in the TSCI kitchen. Further, potentially-hazardous food items are routinely served to El-Tabech in violation of TSCI Food Service Safety and Sanitation procedures.

Human Excrement in El-Tabech’s Food. El-Tabech discovered excrement in his lunchtime meal on April 15, 2008. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 12.) As Corporal Hernandez watched, El-Tabech opened the styrofoam clamshell container containing the vegan entrée. (*Id.* at ¶ 14.) El-Tabech immediately noticed partially-covered feces inside the clamshell. (*Id.* at ¶ 15.) El-Tabech immediately demanded that TSCI staff photograph and preserve the feces as evidence. (*Id.* at ¶ 19.) El-Tabech wrote and filed an Emergency Grievance requesting that “the evidence be preserved.” (*Id.* at ¶ 20, Ex. C.) El-Tabech’s attorneys made the same demand to Assistant Attorney General Matthew Works by telephone later that afternoon. (T. Lane Aff., Pl.’s Ex. 2 at ¶¶ 18, 35.)

Despite being requested to preserve this evidence by both El-Tabech and his counsel, TSCI staff disposed of it. (T. Lane Aff., Pl.’s Ex. 2 at ¶ 39.) The disposal of this evidence directly violated TSCI Evidence Handling Procedures which require retention of physical evidence for “a minimum of 6 months.” (Tecumseh State Corr. Inst., Operational Mem. 204.1.1: Evidence Handling Procedures, Pl.’s Ex. 5 at 10 § VIII.A. (2001).)⁷

⁷ “The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation.” Bd. of Regents v. BASF Corp., 2007 U.S. Dist. LEXIS 82492 at 14-15 (D. Neb. 2007). Spoliation requires “a finding of intentional destruction indicating a desire to suppress the truth.” Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 746 (8th Cir. 2004). “If, however, the destruction of evidence occurs after litigation is imminent or has begun, no bad faith need be shown by the moving party for the court to impose

Other Foreign Objects in Vegan Entrée. Since Defendants began offering El-Tabech a

“kosher diet,” El-Tabech has found many other contaminants in his meals. These objects include:

Item	Date
Hair	11/16/07 (lunch), 12/5/07 (dinner), 12/6/07 (lunch), 12/21/07 (dinner), 12/25/08 (lunch), 12/26/08 (lunch), 1/10/08 (lunch), 1/29/08 (lunch), 3/23/08 (dinner)
Onion Peels	11/23/07 (dinner).
Thermometer	11/11/07 (lunch).
Plastic	12/10/07 (dinner - Styrofoam clamshell and Ziplock bag melted into vegan entrée), 1/11/08 (lunch - Ziplock bag melted into vegan entrée), 1/13/08 (dinner - Ziplock bag melted into vegan entrée), 1/15/08 (lunch - Ziplock bag melted into vegan entrée), 1/20/08 (lunch - Ziplock bag melted into vegan entrée).

(M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 9(a), Ex. A.) Although some of these contaminants may have been placed in El-Tabech’s food inadvertently, the recurring presence of contaminants calls into question TSCI’s willingness or ability to follow the Kosher Process and Kosher Protocols, and the presence of human feces in El-Tabech’s April 15th meal suggests that TSCI staff are intentionally defying this Court’s orders.⁸

Other Kosher Violations. In addition to foreign objects, El-Tabech’s meals have been subject to other kosher violations: celery cut with a knife and prepackaged cereal that is not certified kosher. The Kosher Protocols specify that celery must be broken, not cut. (Kosher Protocol 1.01,

sanctions.” Bd. of Regents at 16; see also Stevenson, 354 F.3d at 750 (“Sanctioning the ongoing destruction of records during litigation and discovery by imposing an adverse inference instruction is supported . . . even in the absence of an explicit bad faith finding.”).

⁸ TSCI staff openly mocked El-Tabech following the discovery of human excrement in El-Tabech’s food. Sergeant Falk stated to another inmate, “You don’t want shit on your tray – you want a shit-free tray.” (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 11(g).) Corporal Antholz asked El-Tabech, “How did that shit taste, good?” (Id. at ¶ 11(i).)

Pl.'s Ex. 6 at 3 ¶ 7 (“Remove the leaves from the celery stalks and wash/clean the stalks under running water. Break the celery stalks into portion sizes that will fit into the zip lock bag.”).) El-Tabech has received cut celery on 17 separate occasions, including six violations in July of 2008. (M. El-Tabech Aff., Pl.'s Ex. 1 at ¶ 9(c), Ex. A.)

The Kosher Process requires that the cereal served for breakfast be “marked as certified kosher.” (Kosher Process, Filing No. 187-2 at 2.) El-Tabech was served non-kosher Kellogg’s “Frosted Mini-Wheats” cereal for breakfast 10 times between December 2007 and March 2008. (M. El-Tabech Aff., Pl.'s Ex. 1 at ¶ 9(d), Ex. A at 7, 9, 11, 13, 21, 22.) El-Tabech was served non-kosher General Mills “Lucky Charms” on three recent occasions. (M. El-Tabech Aff., Pl.'s Ex. 1 at ¶ 9(d), Ex. A at 37, 40.)

The Defendants have had nearly ten months to resolve the initial operating difficulties which might be inherent in the implementation of the kosher procedure. However, despite feedback from El-Tabech and the efforts of El-Tabech’s counsel, the same problems continue to occur.

Violations of TSCI Food Service Procedures. The Defendants’ subordinates are also unable or unwilling to abide by their own food service procedures when providing meals to El-Tabech. At times, this failure prevents El-Tabech from consuming the vegan entrées, fruit, lettuce, and milk, which deprives El-Tabech of a significant source of nutrition.

According to the Food and Drug Administration, the vegan entrées⁹ and milk¹⁰ are “potentially hazardous foods.” Food and Drug Admin., U.S. Dep’t of Health and Human Services, Food Code ¶ 1-201.10(B) at 14 (2005), available online at <http://www.cfsan.fda.gov/~dms/fc05-toc.html> (defining potentially hazardous foods as foods of animal or plant origin that are heat treated). The TSCI Food Service Safety and Sanitation procedures state that “[p]otentially hazardous food requiring hot storage shall be transported at 135 degrees F[ahrenheit] or above” and “[p]otentially hazardous food requiring refrigeration during storage shall be transported at 35-40 degrees [F]ahrenheit.” (Tecumseh State Corr. Inst., Neb. Dept. of Corr. Services, Operational Mem. 108.01.01: Food Service: Safety and Sanitation (2006), Pl.’s Ex. 3 at 12 ¶ XIII.C.-D.)

⁹ The vegan entrées are GoodSource dehydrated meals consisting primarily of rice, vegetable protein, and beans. (GoodSource Corrections, GoodSource Solutions, Inc., Oz Product Information (2000), Pl.’s Ex. 9 at 2, 3, 5, 8, 10.) The vegan entrées are bulk-prepared by TSCI staff by boiling it in a rice cooker and portioning into individual two-cup servings. (Kosher Protocol 1.01, Pl.’s Ex. 6 at 1 § A.) The individual two-cup servings are then microwaved to a temperature of 165 degrees Fahrenheit before transport to El-Tabech. (Kosher Protocol 1.02, Pl.’s Ex. 7 at 2 ¶ 2.) The five flavor varieties are served in rotation to El-Tabech during lunch and dinner. (Religious Kosher Menu, Filing 187-2 at 6–7, Sept. 21, 2007.) Protein amounts vary from 8 grams for the “Chicken & Fried Rice” entrée to 26 grams for the “Beans, Rice & ‘Sausage’” entrée per two-cup serving. (Oz Product Information, Pl.’s Ex. 9 at 1, 3.) The menu calls for two vegan entrée servings per day (Religious Kosher Menu, Filing 187-2 at 6–7), so the vegan entrées provide 16 to 52 grams of protein per day – a significant portion of the 54.4 grams of protein recommended by the R.D.A. for a person of El-Tabech’s age and mass. Commission on Life Sciences, National Research Council, Recommended Dietary Allowances 66 Table 6.4 (10th ed. 1989), available online at <http://www.nap.edu/openbook/0309046335/html/66.html>.

¹⁰ El-Tabech is served Meadow Gold 1% lowfat pasteurized milk. (M. El-Tabech Aff., Pl.’s Ex. 1 ¶ 9(b), Ex. G.) Each one-carton serving provides 8 grams of protein. (M. El-Tabech Aff., Pl.’s Ex. 1, Ex. G.) El-Tabech is served two cartons per day. (Religious Kosher Menu, Filing 187-2 at 6–7.) The resulting 16 grams of protein represents a significant source of the 54.4 grams of protein recommended for a person the age and mass of El-Tabech. See fn. 11, supra.

Although every other prisoner in Gallery “F” has their meals delivered in a hot cart, and milk delivered in a refrigerated cart, the Defendants ignore their own food service safety and sanitation requirements when delivering meals to El-Tabech. They don’t use either the hot food transport cart or the refrigerated cart during the 25 minute trip from the kitchen to El-Tabech’s cell. While at first glance this might not seem significant, it is another example of how the Defendants go out of their way – even to the extent of violating their own regulations – to punish El-Tabech for his kosher diet, or at least make El-Tabech’s kosher meals as unappetizing as possible.

The two vegan entrées and two cartons of milk served to El-Tabech each day provide a minimum of 32 grams of protein, which equates to roughly 60% of the 54.4 grams of protein necessary to maintain El-Tabech’s health. Because, at times, El-Tabech cannot eat the vegan entrées or drink the milk, he is deprived of a significant amount of protein. The diet provided to El-Tabech is thus not “nutritionally-sufficient” in violation of the Court’s order.

The rotten fruit and lettuce served to El-Tabech also violates the Kosher Protocols and TSCI Food Service policy. “It is the policy of the Tecumseh State Correctional Institution that all inmates, confined within the institution, receive meals that are nutritionally adequate [and] properly prepared.” (Tecumseh State Corr. Inst., Neb. Dept. of Corr. Services, Operational Mem. 108.01.02: Food Service: Menu Planning & Meal Prod. (2006), Pl.’s Ex. 4 at 2.) The Religious Kosher Menu calls for “*fresh* fruit” with every meal, and lettuce at designated lunches and dinners. (Religious Kosher Menu, Filing 187-2 at 6–7 (emphasis added).) The fruits and lettuce served to El-Tabech have been partially or fully rotten 63 times. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 9(e), Ex. A.)

The kosher meals prepared by TSCI staff and served to El-Tabech are frequently non-kosher, transported in violation TSCI Food Service procedures, or rotten. El-Tabech is thus routinely

deprived of a significant source of nutrition, particularly protein. The diet provided by Defendants to El-Tabech is not “nutritionally-sufficient,” as required by the Court’s order, or in compliance with the Kosher Protocols or TSCI’s own Food Service procedures.¹¹

B. Defendants Have Failed to Comply With the Court’s Order To Post a Prayer Schedule and Reduce Disruptions of El-Tabech’s Daily Prayers.

On July 17, 2007, this Court ordered that Defendants post a prayer schedule and reasonably accommodate El-Tabech’s prayer times to the extent possible without altering the prison schedule. (Mem. and Order, Filing No. 179 at 6.) A prayer schedule was finally posted in the SMU on September 14, 2007. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 33.) However, the prayer schedule is not posted near El-Tabech’s cell door, and cannot be read from inside the “F” Gallery. (Id. at ¶ 34.) It is also not kept up-to-date. (Id. at ¶ 35.) By posting the prayer schedule where it can’t be seen by the TSCI staff who interact with El-Tabech, and by not maintaining a current prayer schedule, Defendants subject El-Tabech to unnecessary disruptions of his daily prayers.

Since the prayer schedule was first posted in September 2007, a total of 139 unnecessary disruptions have occurred:

Month	# of Disruptions	Disruption Dates
Sept. 2007	7	9/4, 9/10, 9/14, 9/23, 9/24 (x2), 9/29
Oct. 2007	19	10/1, 10/2, 10/3 (x2), 10/4 (x3), 10/5, 10/7, 10/9, 10/10, 10/11, 10/12, 10/17, 10/18, 10/21, 10/23, 10/24, 10/26
Nov. 2007	3	11/10, 11/11, 11/28

¹¹ From April 17 to May 15, 2008, TSCI provided El-Tabech with prepackaged kosher foods or kosher items in the TSCI kitchen that were still in their own skin. TSCI discontinued that practice on May 15, 2008. Since May 15, El-Tabech has refused to eat the vegan entrée or any food handled directly by TSCI staff that is not prepackaged or still in its own skin. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶¶ 24–28.)

Dec. 2007	4	12/7, 12/16, 12/26, 12/27
Jan. 2008	10	1/4, 1/12, 1/16, 1/17, 1/20, 1/21, 1/24, 1/25, 1/29, 1/30
Feb. 2008	7	2/3, 2/4 (x2), 2/11, 2/14, 2/16, 2/17
March 2008	20	3/1, 3/2, 3/3, 3/4, 3/7, 3/8, 3/9, 3/10 (x3), 3/12, 3/17, 3/18, 3/20, 3/22, 3/23 (x2), 3/24, 3/25, 3/29
April 2008	17	4/3, 4/4, 4/6, 4/8, 4/9, 4/11, 4/12 (x2), 4/14, 4/17, 4/18, 4/20, 4/24, 4/25, 4/28, 4/29, 4/30
May 2008	27	5/2, 5/3, 5/5 (x2), 5/6, 5/7 (x2), 5/8 (x2), 5/9 (x4), 5/10 (x2), 5/11 (x3), 5/12, 5/13, 5/15, 5/16, 5/19, 5/21, 5/22, 5/24, 5/29.
June 2008	10	6/1 (x2), 6/2, 6/5, 6/9, 6/10 (x2), 6/17, 6/19, 6/24.
July 2008	15	7/3, 7/4 (x2), 7/5, 7/7, 7/9, 7/10, 7/11, 7/13, 7/14, 7/16, 7/19, 7/21, 7/24, 7/28.

(Excerpted from M. El-Tabech Aff., Pl.’s Ex. 1 ¶ 39, Ex. F.)

Although the Court recognized that accommodating El-Tabech’s prayers does not require altering the prison’s schedule, the disruptions at issue here are unrelated to any scheduled activity and could just as easily have been addressed either before or after El-Tabech’s prayers. Put another way, El-Tabech does not complain about any interruption of his daily prayers that occurs as a result of a scheduled prison activity or an activity that must occur during a given time frame. Rather, El-Tabech’s complaint is that TSCI staff regularly disrupt his prayers for no apparent reason, or to ask routine questions that could be addressed at another time.

Seventy-eight of these disruptions occurred when TSCI staff opened and closed the service hatch on El-Tabech’s cell door for no discernible reason. (*Id.* at ¶ 39(a)-(e), Ex. F.) Thirty-five disruptions occurred when TSCI staff opened the service hatch to deliver or pick up non-kosher

meals, which El-Tabech no longer receives.¹² (Id. at ¶ 39(f), Ex. F.) The remaining disruptions occurred for a variety of reasons, including queries from staff about supply cart items (6 times), yard time (7), legal calls (2), law library access (2), porter duties (2), as well as the pick up or delivery of miscellaneous items such as sheets and blankets, garbage, paperwork or eye drops (15). (Id. at ¶ 39(g)-(h), Ex. F.) On several occasions, the disruption occurred even after the staff member had been informed by El-Tabech that a prayer time was imminent. (Id. at ¶ 41.) Most recently, Caseworker Watkins has forced El-Tabech to choose between his prayer time and weekly law library access by scheduling El-Tabech’s library access to conflict with his evening prayer, despite the fact that at least four other library sessions are available each day that would not pose a conflict. (Id. at ¶ 43.)

II. THIS COURT SHOULD CRAFT A REMEDY THAT MANDATES DEFENDANTS’ COMPLIANCE WITH THIS COURT’S ORDERS.

“Civil contempt sanctions may be imposed for either or both of two distinct purposes, to coerce compliance with a court order, and to compensate the complainant for actual losses sustained by him as a result of the defendants’ contumacy.” In re Tetracycline Cases, 927 F.2d 411, 413 (8th Cir. 1991). Generally, a compensatory sanction “may not exceed the actual loss to the complainant caused by the actions of respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding.” Id.

The Defendants are in contempt of the Court’s orders to provide a “nutritionally-sufficient kosher diet” and to post a prayer schedule and “adjust activities or reduce disturbances as

¹² On or about May 15, 2008, TSCI staff began placing a sign that reads “Feeding. Do Not Open Hatch. F-19 El-Tabech” on El-Tabech’s door when his kosher meal is served. (M. El-Tabech Aff., Pl.’s Ex. 1 ¶ 43.) Even with the sign, TSCI staff have interrupted El-Tabech’s prayers 11 times for non-kosher meal delivery or pick up. (Id. at ¶ 40(f).)

appropriate.” The Court should impose sanctions upon Defendants that remedy El-Tabech’s present situation and compensate him for expenses incurred due to Defendants’ non-compliance.

A. Remedies for Failure to Provide “Nutritionally-Sufficient Kosher Diet.”

Since Defendants cannot manage to comply with the Kosher Process and Protocols in preparing meals for El-Tabech, the Defendants should be required to provide El-Tabech with pre-packaged kosher meals or prepackaged kosher foods available in the kitchen effective immediately.¹³

In addition, due to Defendants’ failure to comply with the Kosher Process and Protocols, El-Tabech has supplemented his diet with prepackaged kosher food purchased from the TSCI Canteen. (M. El-Tabech Aff., Pl.’s Ex. 1 at ¶ 10.) El-Tabech has spent \$532.52 on these purchases (Id. at ¶ 10, Ex. B), and should be reimbursed for this amount.

B. Remedies for Failure to Reasonably Accommodate Prayer Schedule.

To remedy Defendants’ failure to post and accommodate El-Tabech’s prayer schedule, the Court should require that Defendants immediately post a current Islamic prayer schedule that shows the daily time for each of the five required prayers outside El-Tabech’s cell door. In addition, Defendants should maintain this prayer schedule by replacing it if it is removed or as the prayer times change. Finally, the Court should order that Defendants not disturb El-Tabech during posted prayer times, except for an emergency or previously scheduled activity.

¹³ Defendants have already demonstrated they can immediately provide this remedy. After the April 15, 2008, discovery of feces in El-Tabech’s vegan entrée, TSCI began providing El-Tabech provided with meals consisting entirely of prepackaged, kosher items already available in the kitchen. (M. El-Tabech Aff., Pl.’s Ex. 1 ¶¶ 25-26.) The items were either factory-sealed or “in their own skin,” such as fruit and boiled eggs. (Id.) The milk and Ensure nutritional supplement were also transported and served cold using ice-filled plastic bags. (Id.) The Defendants discontinued this practice on May 15, 2008. (Id. at ¶ 27.)

REQUEST FOR HEARING

Although El-Tabech has no additional evidence to present to the Court, El-Tabech suggests that Defendants should personally appear before the Court to explain why they should not be held in contempt and why their subordinates have refused to comply with the Court's prior orders.

CONCLUSION

WHEREFORE, El-Tabech respectfully requests that this Court:

1. Enter an order requiring Defendants to show cause why they should not be held in contempt;
2. Adjudge Defendants in contempt;
3. Enter an order requiring Defendants to supply El-Tabech with a "nutritionally-sufficient kosher diet" that consists of either prepackaged kosher meals or prepackaged kosher foods available in the TSCI kitchen;
4. Enter an order requiring Defendants to compensate El-Tabech in the amount of \$532.52 for kosher food purchases from the canteen since the implementation of the current meal plan;
5. Enter an order requiring Defendants to immediately post and maintain outside Plaintiff's cell door a current Islamic prayer schedule that shows the time of each of the five required daily prayers;
6. Enter an order that Defendants not disturb Plaintiff during these posted prayer times, except for an emergency or previously scheduled activity;
7. Award El-Tabech his reasonable attorney's fees and costs in monitoring Defendants' compliance and bringing this Motion for enforcement of the Court's orders; and
8. For such further, additional, or different relief as deemed appropriate by the Court.

Dated this 26th day of August, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of August, 2008, the foregoing Brief in Support of Motion for an Order to Show Cause Why Defendants Should Not Be Held in Contempt was electronically filed using the CM/ECF system which sent notification of the filing to:

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A courtesy copy of the foregoing Brief in Support of Motion for an Order to Show Cause Why Defendants Should Not Be Held in Contempt was sent on the 26th day of August, 2008, via U.S. First Class Mail, postage prepaid, to:

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/s/ Gene Summerlin