IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREDERICK ROGERS,

OPINION AND ORDER

Plaintiff,

01-C-589-C

v.

C. O. LOCKWOOD,

Defendant.

- -

This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Fred Rogers is an inmate in the Wisconsin prison system. He was incarcerated at the Dodge Correctional Institution in Waupun, Wisconsin at all times relevant to the acts giving rise to this case. Plaintiff contends that defendant Craig Lockwood, who was a correctional officer at the prison, violated plaintiff's right to be free from cruel and unusual punishment by exposing him to cigar smoke, triggering his post-traumatic stress disorder and his schizoaffective disorder. Currently before the court are the parties' cross motions for summary judgment. Jurisdiction is present under 28 U.S.C. § 1331.

From the parties' proposed findings of facts, I find that the following facts are

material and undisputed.

UNDISPUTED FACTS

Plaintiff Fred Rogers is an inmate in the Wisconsin prison system and was incarcerated at the Dodge Correctional Institution at the time relevant to this action. Defendant Craig Lockwood was a correctional officer at the prison at the time.

Plaintiff was incarcerated in Unit 10 of the institution from August 24, 2001 through September 17, 2001. During this time, defendant was assigned to Unit 10 for a total of seven shifts. He smoked cigars inside the unit during these shifts. Plaintiff informed defendant that cigar smoke triggered plaintiff's mental disorders. Defendant responded by saying that he "wasn't going to stop smoking for a retard."

Plaintiff was diagnosed with post-traumatic stress disorder and schizoaffective disorder by a prison psychiatrist in 1999. He has reported consistently to prison psychiatrists that his mental ailments began at age six when he was the victim of an abduction and physical, emotional and sexual assault. Psychiatric progress notes for plaintiff dated September 30, 2001 indicate that plaintiff complained of increased traumatic flashbacks triggered by cigar smoke, Southern accents, homosexuality and being unjustly punished. The psychiatrist's notes state also that "what [plaintiff] wanted most from me was to make sure that this [sic] trigger mechanisms were put into his chart."

The psychiatric report from a September 5, 2001 appointment indicated that plaintiff complained of a mild depressed mood but otherwise appeared calm and alert. A September 12, 2001 session report reveals that plaintiff claimed he no longer felt depressed and wished to be taken off medication.

On September 16, 2001, two inmates on Unit 10 complained that defendant had harassed them by turning their cell lights on and off, kicking their door and blowing smoke into their cell. Both of the inmates were extremely agitated and one was placed in temporary lock-up while the other was placed in observation status. As a result of the incident, defendant was suspended and eventually terminated.

Plaintiff's mental state in October and November 2001 was in flux. Plaintiff's psychiatric progress notes indicate that in October he stopped taking one of his medications because he believed the guards were poisoning him and that he beat his head against the wall during an examination session. On October 28, 2001, plaintiff complained of "phantom pains from the beatings he gets." Otherwise, he was generally uncommunicative. By November 25, 2001, the psychiatrist described plaintiff as "pleasant, friendly, polite and able to give a reasonable account of what happened."

OPINION

The Eighth Amendment prohibits cruel and unusual punishment for those convicted

of crimes. It protects against some deprivations that are not part of a sentence, but are suffered during imprisonment. Estelle v. Gamble, 429 U.S. 97 (1976). The Eighth Amendment imposes upon jail officials the duty to "provide humane conditions of confinement" for prisoners. Farmer v. Brennan, 511 U.S. 825, 832, (1994). However, not every injury or deprivation suffered by a prisoner translates into constitutional liability for prison officials responsible for the prisoner's health and well-being. See Farmer, 511 U.S. at 834; Estelle, 429 U.S. at 105; Oliver v. Deen, 77 F.3d 156, 159 (7th Cir. 1996).

An inmate suing under § 1983 for an Eighth Amendment violation must satisfy both an objective and a subjective component. Wilson v. Seiter, 501 U.S. 294, 298 (1991); Doe v. Wellborn, 110 F.3d 520, 523 (7th Cir. 1997). First, the injury suffered must have been objectively sufficiently serious. Rhodes v. Chapman, 452 U.S. 337, 347-49 (1981). The Eighth Amendment "does not mandate comfortable prisons," but protects against "unnecessary and wanton infliction of pain." Id.; Gregg v. Georgia, 428 U.S. 153, 173 (1976). The subjective component requires that the plaintiff prove that the prison official was deliberately indifferent to a substantial risk of serious injury. Estelle, 429 U.S. at 106. See Franzen v. Duckworth, 780 F.2d 645, 652 (7th Cir. 1985) (noting that the infliction of punishment is a deliberate act). "[T]he official must both be aware of the 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.

The Supreme Court derived the requirement that the injury suffered be sufficiently serious from the Eighth Amendment's own limitation that not all punishment is impermissible, only punishment that is "cruel and unusual." Rhodes, 452 U.S. at 345-46. The Court has observed that these words must be given a flexible and dynamic meaning in order for its protections to remain vital. Gregg, 428 U.S. at 171. The Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). What constitutes an injury that is sufficiently serious to invoke the Constitution is neither static nor absolute; it instead should be "applied with due regard for the differences in the kind of conduct against which an Eighth Amendment objection is lodged." Hudson v. McMillian, 503 U.S. 1, 8 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

The Supreme Court has articulated objective standards regarding the severity of the deprivation a prisoner must have suffered for certain categories of claims. When prisoners challenge the conditions of their confinement, they must prove such an extreme deprivation of the "minimal civilized measure of life's necessities" as to pose a substantial risk of serious harm. Rhodes, 452 U.S. at 347; Farmer, 511 U.S. at 834. For an excessive use of force claim, prisoners face a very low burden "because contemporary standards of decency are always violated . . . when prison officials maliciously and sadistically use force to cause harm." Hudson, 503 U.S. at 9. In excessive force cases, a prisoner must show only some

kind of harm resulting from malicious or sadistic physical punishment, so long as the use of force is neither *de minimus* nor "repugnant to the conscience of mankind." Id. at 9-10 (quoting Whitley, 475 U.S. at 327). However, the harm cannot be so little as a slap on the wrist. Leslie v. Doyle, 125 F.3d 1132, 1135 (7th Cir. 1997).

Plaintiff's claim does not fit easily into either of these categories. The kind of exposure to tobacco smoke involved in this case is not the kind of continuous exposure to environmental smoke from tobacco that might be raised in a conditions of confinement claim. See, e.g., Helling v. McKinney, 509 U.S. 25, 35-36 (1993); Oliver v. Deen, 77 F.3d 156 (7th Cir. 1996); Alvarado v. Litscher, 267 F.3d 648 (7th Cir. 1996). The present case is also distinguishable from the typical claim of the use of excessive force, where a "prison security measure is undertaken to resolve a disturbance," but the level of force used is disproportionate to what was reasonably necessary. Whitley, 475 U.S. at 320-21. Vindictive and anarchic acts by prison officials do not fit easily into the Eighth Amendment rubric because they cannot be characterized easily as "punishment." Leslie, 125 F.3d at 1137; Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (punishment implies that penalty is "deliberately administered for penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners").

However, in this case it is unnecessary to decide under what category of Eighth

Amendment claims plaintiff's claim might fall. There can be no Eighth Amendment violation under either category without a showing of at least some level of harm. Leslie, 125 F.3d at 1135 (although very small punishments may be cognizable, there must still be some objectively sufficiently serious deprivation) (citing Farmer, 511 U.S. at 834); Hudson, 503 U.S. at 9 (although there need not be a significant injury where prison officials act maliciously and sadistically, "not . . . every malevolent touch by a prison guard gives rise to a federal cause of action."). Further, §1983 is a tort statute. "To prevail under it a plaintiff must show not only that his federal rights were violated but also that, had it not been for the violation, the injury of which he complains would not have occurred." Button v. Harden, 814 F.2d 382, 383 (7th Cir. 1987).

Plaintiff has failed to put in any evidence to show that defendant's cigar smoking caused the injury about which he complains. He has entered into evidence his mental health history file for September through November of 2001. The reports of psychiatrists prepared during this time confirm that plaintiff suffers from post-traumatic stress disorder and schizoaffective disorder. However, with the exception of the September 30, 2001 report, there is no mention in the reports that plaintiff's exposure to cigar smoke might trigger the symptoms of these disorders. Even in the September 30, 2001 report, the psychologist does not actually diagnose cigar smoke as a trigger for plaintiff's mental disorders, but notes only that plaintiff has claimed that cigar smoke, Southern accents, homosexuality and being

unjustly punished trigger traumatic flashbacks.

As the facts show, plaintiff was incarcerated in Unit 10 of the institution from August 24, 2001 through September 17, 2001. During this time, defendant was assigned to Unit 10 for a total of seven shifts. The psychiatric reports from early September reveal only that plaintiff complained of a mild depressed mood on September 5, 2001, but no longer felt depressed and wished to be taken off medication by September 12, 2001. These reports were being made precisely at the time defendant was working in plaintiff's unit. Nothing in the reports suggests the cause of plaintiff's depression or mentions defendant by name or otherwise. Indeed, plaintiff has provided no expert evidence to show that mild depression is even a symptom of his mental disorders.

Moreover, it would be inappropriate to infer that plaintiff's mental state immediately after September 2001 was caused by his exposure to cigar smoke. Oliver, 77 F.3d at 160 (mild asthmatic had not shown causal relationship between cellmate's cigarette smoking and aggravation of his symptoms in part because any number of things can trigger asthma). Plaintiff has been suffering from both post-traumatic stress disorder and schizoaffective disorder for approximately two years before September 2001. He admits that the symptoms can be caused by things other than cigar smoke. Although plaintiff says that during this time he believed he was being poisoned by his medication and was banging his head against the wall during an examination and complaining of "phantom pains from the beatings he gets,"

plaintiff cannot prove that these behaviors are symptoms of his psychological disorders and that they were triggered by his exposure to defendant's cigar smoke because he has no expert testimony to make the link between asserted cause and alleged effect. Therefore, plaintiff cannot succeed on his claim that defendant's cigar smoking caused an aggravation of the symptoms of his psychological disorders.

Because plaintiff has failed to put in evidence to show that defendant's acts caused an injury, he has failed to demonstrate the causation required in actions brought under § 1983. Therefore, it is unnecessary to determine the level of deprivation that would be sufficiently serious in this case, Hudson, 503 U.S. at 8-10, or whether defendant was deliberately indifferent to the risk of harm his actions might pose to plaintiff's mental health.

Defendant argues that plaintiff's claim cannot succeed because it is barred by the Prison Litigation Reform Act, specifically under 42 U.S.C. § 1997e(e). That provision bars a prisoner confined in a jail from recovering monetary damages for mental or emotional injury suffered without a prior showing of physical injury. 42 U.S.C. § 1997e(e). It is true that plaintiff seeks monetary damages only. (He could not successfully pursue injunctive relief because he is no longer detained at the Dodge facility and because defendant is no longer employed there.) However, section 1997e(e) "does not restrict a plaintiff's ability to recover compensatory damages for actual injury, nominal or punitive damages, or injunctive and declaratory relief." Thompson v. Carter, 284 F.3d 411, 416 (2d Cir. 2002). See

Cassidy v. Indiana Department of Corrections, 199 F.3d 374, 376-77 (7th Cir. 2000) (damages for mental and emotional injury barred, but plaintiff free to seek other forms of recovery). Section 1997e(e) does not bar prisoners from pursuing constitutional claims, but merely creates a limitation on recovery. Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2000).

ORDER

IT IS ORDERED that defendant C.O. Lockwood's motion for summary judgment is GRANTED and plaintiff Frederick Rogers's motion for summary judgment is DENIED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 26th day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge