IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DOUGLAS RICHER,

Plaintiff,

v.

LA CROSSE COUNTY, LA CROSSE COUNTY SHERIFF'S DEPARTMENT, DEPUTY KEN DAWSON, DEPUTY JASON BENRUD, DEPUTY MIKE DURAND, DEPUTY JAMES VERSE and ABC INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

01-C-649-C

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In this civil action for monetary relief, plaintiff Douglas Richer, an inmate at the La Crosse County jail, alleges that defendants used excessive force against him in violation of the Eighth Amendment. In addition, plaintiff alleges that defendants violated his right to due process under the Fourteenth Amendment and his rights under the Wisconsin Constitution. Jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court is defendants' motion for summary judgment. With respect to defendants La Crosse County and La Crosse County Sheriff's Department, the

motion will be granted. Plaintiff concedes that those two defendants were improperly named. With respect to the remaining defendants, the motion will be granted in part and denied in part. Plaintiff concedes that his claim is more appropriately analyzed under the Eighth Amendment rather the Fourteenth Amendment. In addition, although he continues to assert that his rights under the state constitution were violated, he has failed to identify what provisions are applicable or otherwise develop an argument. Accordingly, plaintiff's due process claim and his state law claims will be dismissed. However, I conclude that a reasonable jury could find that defendants Ken Dawson, Jason Benrud, Mike Durand and James Verse subjected plaintiff to cruel and unusual punishment by using excessive force against him. In addition, I conclude that those defendants are not entitled to qualified immunity.

From the parties' proposed findings of fact, I find that the following facts are material and undisputed. (I note that although defendants disputed many of plaintiff's allegations in their briefs, they disputed only a few of his proposed findings of fact in their response to his proposed findings. Under this court's procedures, a copy of which was provided to the parties with the preliminary pretrial conference order, the court will conclude that a proposed fact is undisputed if the opposing party does not dispute that fact in its response to the other party's proposed findings of fact. Procedures, II.C. Disputing facts in a brief is insufficient. Id. at I.B.4. Therefore, I will consider as undisputed any facts proposed by

plaintiff that defendants did not dispute in their response to plaintiff's proposed findings of fact.)

UNDISPUTED FACTS

Plaintiff Douglas Richer is an inmate at the La Crosse County jail. Defendants Jason Benrud, Mike Durand, Ken Dawson and James Verse are sheriff's deputies working in the jail for the La Crosse County Sheriff's Department.

On the evening of August 11, 2000, defendant Durand informed defendant Benrud that plaintiff had just sprayed shaving cream on another inmate's shirt in the prison dayroom. Defendant Benrud summoned plaintiff into the sallyport area. Because plaintiff is a member of a white supremacist group and the other inmate was an African-American, defendant Benrud was concerned about possible racial tensions. Benrud asked plaintiff why he sprayed shaving cream on the inmate. Plaintiff responded that he did not know what defendant Benrud was talking about. In addition, plaintiff asked, "What did I do?" and stated, "This is not a rule violation." Plaintiff continued questioning defendants Benrud and Durand; his demeanor and posture became threatening and confrontational. Defendant Benrud became agitated. (It is not clear from the parties' proposed findings of fact whether plaintiff or defendant Benrud became upset first.)

After arguing with plaintiff for some time, defendant Benrud informed plaintiff that

he would be placed in the "lockdown block" and told him to turn around and place his hands behind his back. Plaintiff held his hands flat, palms out and asked what he had done. Defendant Benrud began screaming at plaintiff to put his hands behind his back. In response, plaintiff stated that the officers did not have the authority to take him to segregation for a minor rule violation.

When plaintiff continued to question defendant Benrud and failed to comply with Benrud's orders, Benrud attempted to force plaintiff's right arm behind his back while defendant Durand grabbed plaintiff's left arm. Plaintiff had both of his fists clenched and was moving his arms. Benrud and Durand were unable to get plaintiff's arms around his back to handcuff him. When defendant Durand grabbed one of plaintiff's legs, plaintiff said that he would comply, but defendant Benrud told plaintiff that it was too late for that. Defendant Benrud struck plaintiff in the right eye with his left elbow.

Officer Jay Lyngaas, who was observing the incident from the guard area, called for assistance. Other officers arrived, including defendants Dawson and Verse. Dawson grabbed plaintiff's hair and punched him in the face, striking him in the left eye. Dawson placed his hands behind plaintiff's neck and shoulders and attempted to push him down. The officers and plaintiff went down on the floor, with plaintiff on his stomach.

Once on the floor, plaintiff was in and out of consciousness. The officers told him to stop resisting. Plaintiff began vomiting. He held his arms underneath him. Eventually,

one of the officers was able to pull out plaintiff's arms and handcuff him. Defendant Verse placed shackles on plaintiff's feet.

The officers decided to carry plaintiff horizontally to the lockdown cell. The officers picked up plaintiff by his legs and started to drag him on his face. After being moved a few feet, plaintiff began screaming and kicked Lyngaas. The officers placed plaintiff back on the floor and he continued to writhe and kick. Defendant Dawson stated he was going to administer pepper spray to regain control of plaintiff. Dawson sprayed plaintiff for 1-2 seconds. Plaintiff had difficulty breathing and vomited again. Plaintiff then indicated he would cooperate and stop resisting. Plaintiff was informed that if he did not cooperate, he would be sprayed again. Plaintiff was assisted to his feet and then walked to the lockdown cell.

After placing plaintiff in the cell, the officers removed his restraints and exited the cell. Plaintiff still had difficulty breathing after being placed in the cell.

Later, a nurse came in to examine plaintiff. The nurse noted that plaintiff had symmetrical abrasions and lumps on both sides of his face at eye and cheek levels. She also noted in her report that the abrasions were not present when plaintiff was escorted to the cell.

OPINION

A. Screening under 28 U.S.C. § 1915A

As a preliminary matter, I note that this court has not yet screened plaintiff's complaint in accordance with 28 U.S.C. § 1915A. That was an oversight. Under § 1915A, a district court is required to screen all complaints filed by prisoners, even if they are represented by counsel and the filing fee has been paid in full. Plaintiff is a prisoner at the La Crosse County jail and most of the defendants are either governmental entities or officers of governmental entities. Therefore, before I can consider defendants' motion for summary judgment, I must determine first whether plaintiff's complaint is frivolous or fails to state a claim upon which relief can be granted. 28 U.S.C. § 1915A(b). In their summary judgment motion, defendants contend that plaintiff's complaint fails to state a claim. I will consider those arguments in the context of screening the complaint.

In his complaint, plaintiff alleges that defendants Benrud, Dawson, Durand and Verse "used unreasonable and excessive force in an attempt to restrain Douglas Richer while at the La Crosse County jail, when he was kicked, punched, beaten and pepper sprayed by those defendants, thus violating his Constitutional rights." This allegation is sufficient to state a claim for excessive force under the Eighth Amendment. It provides the "bare minimum facts necessary to put the defendant[s] on notice so that [they] can file an answer," Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (citations omitted), and therefore satisfies the pleading requirements of Fed. R. Civ. P. 8. Furthermore, these facts could support a claim

of excessive force under the Eighth Amendment. Accordingly, I conclude that plaintiff's complaint is not frivolous and that it states a claim upon which relief may be granted.

Defendants contend that because plaintiff's complaint refers to defendants' conduct as "negligent," he has failed to state a claim upon which relief can be granted. Defendants are correct that a showing of negligence is insufficient to prove a constitutional violation, at least in the context of an excessive force claim. See Hudson v. McMillan, 503 U.S. 1, 7 (1992). However, I disagree that plaintiff's complaint must be dismissed. First, asserting that defendants' conduct was negligent is not a concession that such conduct would fail to satisfy a more demanding standard. Plaintiff also alleges in his complaint that defendants' conduct was "unreasonable" and "outrageous." Regardless, defendants cite no authority that would require this court to dismiss a complaint because it incorrectly identifies the legal standard governing a claim. The Supreme Court has rejected the view that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." Conley v. Gibson, 355 U.S. 41, 48 (1957). Whether plaintiff must ultimately prove negligence, recklessness or malice, in determining the legal sufficiency of the complaint, the question is whether "it is clear that no relief could be granted under any set of *facts* that could be proved consistent with the allegations." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)) (emphasis added). I have already determined that plaintiff could prove a set of facts that would entitle him to relief.

Therefore, plaintiff's use of the word "negligent" does not doom his complaint to dismissal.

With respect to plaintiff's claim that defendants violated his right to due process under the Fourteenth Amendment, plaintiff concedes that his claim is more appropriately analyzed under the Eighth Amendment. Also, plaintiff concedes that La Crosse County and La Crosse County Sheriff's Department were improperly named. Accordingly, plaintiff's due process claims and all his claims against La Crosse County and La Crosse County Sheriff's Department will be dismissed.

B. Motion for Summary Judgment

In any claim that an official used excessive force in violation of the Eighth Amendment, the "core judicial inquiry" is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 7. "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated . . . whether or not significant injury is evident." Id. at 9 (citations omitted). To determine whether force was used appropriately, a court considers the need for the application of force, the relationship between that need and the amount of force used and the extent of the injury inflicted. Whitley v. Albers, 475 U.S. 312, 321 (1986). Also relevant are factors such as the extent of the safety threat as reasonably perceived by the officers and the efforts made by the officers to mitigate the

severity of force. Id. Although it is not the case that "every malevolent touch by a prison guard gives rise to a federal cause of action," only a very minor use of physical force is excluded from the Eighth Amendment's prohibition of cruel and unusual punishment. Hudson, 503 U.S. at 9-10. Further, it is not necessary to show that the excessive force was part of ongoing policy rather than an isolated and unauthorized event for the purpose of holding individual officers liable. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).

The first issue is whether *any* force was necessary. Plaintiff suggests that it was not, arguing that defendants decided to "teach him [plaintiff] a lesson" for "no legitimate purpose" and that the "physical escalation of the discussion into a melee" occurred as the result of "the selfish, malicious motives on the part of the officers." Plt.'s Br., dkt. #37, at 6. This argument appears to assume that plaintiff's failure to comply with orders of prison officials does not constitute a "legitimate reason" for applying force. However, as noted by defendants, the court of appeals has rejected the view that the Eighth Amendment prohibits the use of physical force as a means of responding to noncompliance. In Soto v. Dickey, 744 F.2d 1260, 1267 (7th Cir. 1984), the court stated that when a correctional officer gives an order to an inmate "and the inmate cannot be persuaded to obey the order, some means must be used to compel compliance, such as a chemical agent or physical force." The court explained that "[w]hen an inmate refuse[s] to obey a proper order, he is attempting to assert

his authority over a portion of the institution and its officials. Such a refusal and denial of authority places the staff and other inmates in danger." Id. See also Caldwell v. Woodford County, 968 F.2d 595, 600-01 (6th Cir. 1992) ("The jail has a legitimate interest in having inmates obey orders.").

Perhaps plaintiff means to argue that the order to turn around and place his arms behind his back was not "proper" under Soto because the shaving cream accusation, even if true (and plaintiff denies that he put shaving cream on an inmate), would not justify a decision to place him in segregation. Although one could argue in hindsight that defendant Benrud acted harshly, or at least hastily, in deciding that segregation was necessary, it does not follow that plaintiff had the right to disobey the order, even if plaintiff was correct that the alleged misconduct did not merit segregation. If the order itself was made in bad faith or if the order involved patently unreasonable conduct, such as harming the inmate himself or another person, then it certainly could be argued that any amount of force used to insure obedience to the order would be excessive. See Felix v. McCarthy, 939 F.2d 699 (9th Cir. 1991) (holding that officer was not entitled to qualified immunity when he pushed and handcuffed inmate for refusing to comply with an order to clean up officer's spit); see also Washington v. Harper, 494 U.S. 210, 238 (1990) (Stevens, J., concurring in part and dissenting in part) (referring to "the liberty of citizens to resist the administration of mind altering drugs"); Jackson v. Allen, 376 F. Supp. 1393 (E.D. Ark. 1974) (holding that prisoner

has right to resist unconstitutional punishment if it presents immediate danger of permanent injury or death). In this case, however, even assuming that plaintiff was not involved in the shaving cream incident, there is no evidence that defendant Benrud issued the order in bad faith or that Benrud accused plaintiff of misconduct out of malice or with the purpose of framing him. Furthermore, it is undisputed that plaintiff failed repeatedly to comply with defendant Benrud's orders and that plaintiff became confrontational. Therefore, I cannot conclude "that there was no plausible basis" for the defendant Benrud's belief that "force was necessary." Whitley, 475 U.S. at 323. If plaintiff believed he was being punished unfairly, the proper course of action was to comply with the order and then to seek legal redress.

Although defendants were entitled to use some amount of force, this does not mean they had carte blanche to restrain plaintiff in whatever manner they wished. Also to be considered is the relationship between the need for force and the amount of force used. Whitley, 475 U.S. at 321. It is undisputed that during the struggle plaintiff stated he would comply but defendant Benrud told him it was too late for that and then struck plaintiff in the right eye, that defendant Dawson grabbed plaintiff's hair and punched him in the face, that defendants Benrud, Durand, Dawson and Verse dragged plaintiff on his face and that defendant Dawson administered pepper spray on plaintiff. It is disputed whether plaintiff actively resisted defendants' efforts throughout the incident.

Defendants are correct that the court of appeals has held that use of a "chemical

agent" "to subdue recalcitrant prisoners does not constitute cruel and unusual punishment," so long as it is not used "in quantities greater than necessary or for the sole purpose of punishment or infliction of pain." Soto, 744 F.2d at 1270; see also Colon v. Schneider, 899 F.2d 660, 669 ("[P]rison officials' actions in using chemical agents in a humane manner to control recalcitrant inmates who pose threats to institutional security will rarely be a proper basis for judicial oversight.") However, the court of appeals has taken a different view regarding more direct physical assaults. In Thomas v. Salter, 20 F.3d 298 (7th Cir. 1994), several officers told an inmate that he was to submit to a blood test. The inmate refused, so the officers forced the inmate onto a gurney, held him down, punched him in the face and told him to shut up. The court concluded that these facts were sufficient to permit a reasonable jury to find that the officer had acted maliciously and sadistically to cause harm. The facts in this case are similar. A reasonable jury could find that striking plaintiff and dragging him on his face was not necessary in order to subdue him. Further, the parties dispute whether plaintiff was injured in the struggle. (Defendants assert that plaintiff's swelling and bruises were incurred as the result of plaintiff's banging his head repeatedly against the cell door.) Viewing the evidence in the light most favorable to plaintiff, I conclude that plaintiff could show that defendants acted maliciously and sadistically to cause harm and that he incurred injuries that were more than minimal.

Defendants argue in the alternative that even if they used excessive force, they are entitled to qualified immunity nevertheless. An officer is entitled to qualified immunity if a reasonable officer could have believed that his conduct was constitutional in light of the clearly established law and the information the officer possessed at the time the incident occurred. Saucier v. Katz, 533 U.S. 194 (2001). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Hope v. Pelzer, 122 S.Ct. 2508, 2515 (2002) (quoting Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985)). It is not necessary that the facts in the present case be "fundamentally similar" to earlier cases. Id. at 2516. Rather, the question is whether the state of the law gave defendants "a fair warning that their alleged treatment of [plaintiff] was unconstitutional." Id.

Defendants are not entitled to qualified immunity if plaintiff can prove the facts he alleges because they would support an Eighth Amendment claim under the law clearly established by Thomas, 20 F.3d 298. That case made clear that striking an inmate when it is unnecessary as a means of control can be cruel and unusual punishment. Therefore, defendants' motion for summary judgment will be denied with respect to plaintiff's claim that defendants Benrud, Durand, Dawson and Verse violated his clearly established rights under the Eighth Amendment.

In addition to his claims under the federal constitution, plaintiff alleged in his

complaint that defendants violated his rights under "the Constitution of the State of Wisconsin." However, plaintiff has failed to identify which provisions of the state constitution are implicated or otherwise develop this argument. Accordingly, defendants' motion for summary judgment will be granted with respect to plaintiff's state law claims.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants La Crosse County, La Crosse County Sheriff's Department, Deputy Ken Dawson, Deputy Jason Benrud, Deputy Mike Durand, Deputy James Verse and ABC Insurance Company is GRANTED with respect to defendants La Crosse County and La Crosse County Sheriff's Department. Those two defendants are DISMISSED from this case.

2. Defendants' motion for summary judgment is GRANTED with respect to plaintiff's state law claims and his claim that his due process rights were violated.

3. Defendants' motion for summary judgment is DENIED with respect to plaintiff's claim that defendants Dawson, Benrud, Durand and Verse used excessive force on plaintiff

in violation of the Eighth Amendment.

Entered this 5th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge