

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS L. SCHROEDER,

Petitioner,

v.

ORDER

03-C-0299-C

GOTH,

THOMPSON and

PETERSON,

Respondents.

This is a proposed civil action for monetary and declaratory relief brought pursuant to 42 U.S.C. § 1983. Petitioner Thomas L. Schroeder, a Wisconsin inmate housed at the Northfork Correctional Facility in Sayre, Oklahoma, alleges that while he was housed at the Rock County jail in Janesville, Wisconsin, respondents violated his Eighth Amendment rights when respondent Thompson used excessive force against him and respondents Goth and Peterson failed to intervene. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, the prisoner's complaint must be dismissed if, even under a liberal construction, it is legally frivolous,

malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. See 42 U.S.C. § 1915e. Although this court will not dismiss petitioner's case on its own for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint and attachments, petitioner makes the following material allegations of fact.

ALLEGATIONS OF FACT

Petitioner Thomas L. Schroeder is a Wisconsin inmate housed at the Northfork Correctional Facility in Sayre, Oklahoma. Respondents Goth, Peterson and Thompson are correctional officers at the Rock County jail in Janesville, Wisconsin. At all relevant times, petitioner was housed at the jail as a pretrial detainee.

Respondents Goth and Peterson searched petitioner's cell. During the search, respondent Goth confiscated a book that petitioner had taken from the jail's book cart. Petitioner asked for the book back, but respondent Goth told him, "No, you already have three books." Petitioner told respondent Goth that he wanted to finish reading that book.

Goth replied, "You have no say so and the choice isn't yours."

Petitioner slid another book, the Bible, out of his cell on the floor. The Bible came to rest on the lip on the floor that prevents items from falling from the top tier cells to the lower tier cells. Respondents Goth and Peterson ran up the stairs and told petitioner to step out of the cell and place his hands behind his head. Petitioner asked what was going on. Respondent Thompson told him that "no one throws books at me and gets away with it."

Respondents Thompson and Peterson took petitioner downstairs. Respondent Thompson threw petitioner on a metal table, grabbed him by the throat, punched him in the eye, threw him to the floor and put his knee in petitioner's back. Petitioner told respondent Thompson to remove his knee. While grinding petitioner's face into the floor, respondent Thompson told him to calm down or he would pepperspray him. Respondents Goth and Peterson were present and said nothing. Petitioner never struggled or resisted during the entire episode.

Petitioner's ankles were shackled and he was taken to the booking room. In the booking room he was placed in a restraining chair and handcuffed. Petitioner remained handcuffed in the chair for five hours. He was then placed in a holding cell.

At his request, petitioner was taken to see a nurse at 8 p.m. Petitioner had a dislocated shoulder, contusion to his right eye, scrapes to his face and a swollen left hand. Petitioner was taken to the Mercy Hospital emergency room. At the hospital, petitioner was diagnosed with contusions to the right eye, left hand and face, and a left shoulder strain.

Petitioner was prescribed three to four ibuprofen tablets to be taken every six hours, given an ace bandage and told to return in three to four days for a follow-up visit.

When petitioner returned to the jail, he was placed in a holding cell for three days with only his jail uniform and a cup and without any bed linen. Then petitioner was placed in lockdown for 20 days and subsequently charged with disorderly conduct, a misdemeanor that was later dismissed. On December 5, 1999 petitioner was released from segregation.

DISCUSSION

Petitioner alleges that his Eighth Amendment rights were violated when respondent Thompson used excessive force against him and when respondents Goth and Peterson failed to intervene.

The Eighth Amendment prohibits conditions of confinement that “involve the wanton and unnecessary infliction of pain.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force “was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and

the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. See Whitley v. Albers, 475 U.S. 312, 321 (1986); but see Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir. 2001).

Petitioner alleges that respondent Thompson threw petitioner on a metal table, grabbed him by the throat, punched him in the eye, threw him to the floor and put his knee in petitioner's back while grinding petitioner's face into the floor. Petitioner denies that he ever resisted or struggled. Accordingly, petitioner has stated a claim of excessive force and will be allowed to proceed against respondent Thompson. As to respondents Goth and Peterson, because petitioner has alleged facts suggesting that these "prison guards knew of the impending injury and the injury would have been readily preventable had the guards intervened," Gibbs v. Franklin, 49 F.3d 1206, 1208 (7th Cir. 1995); see also Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972), he has stated an Eighth Amendment claim and will be granted leave to proceed against these two respondents.

ORDER

IT IS ORDERED that

1. Petitioner Thomas L. Schroeder's request for leave to proceed in forma pauperis against respondents Goth, Peterson and Thompson is GRANTED;
2. The unpaid balance of petitioner's filing fee is \$138.69; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

3. Service of this complaint will be made promptly after petitioner submits to the clerk of court three completed marshals service form and four completed summonses, one for each respondent and one for the court. Enclosed with a copy of this order is a set of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before July 29, 2003, his complaint will be subject to dismissal for failure to prosecute.

4. In addition, petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' attorney.

Entered this 9th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge