IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TITUS HENDERSON,

Plaintiff,

v.

OPINION AND ORDER

03-C-729-C

DAVID BELFUEL, in his individual and official capacity,
JEFFREY ENDICOTT, in his individual and official capacity,
SUZANNE DEHAAN, in her individual and official capacity,
SCOTT ECKSTEIN, in his individual capacity,
JANELLE PASKE, in her individual capacity,
DAVID TARR, in his individual capacity,
SANDRA HAUTAMAKI, in her individual capacity,
CINDY O'DONNELL, in her official capacity,
HERB DEHN, PAUL RUHLAND and JUDY
CHOJNASKI,

Defendants.

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This is a civil action for monetary, injunctive and declaratory relief brought under 42 U.S.C. § 1983. Pro se plaintiff Titus Henderson is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Plaintiff contends (1) that defendants Jeffrey Endicott, Suzanne Dehann, Scott Eckstein, David Tarr, Herb Dehn and Paul Ruhland violated his Eighth Amendment rights by inserting a needle into his arm for the sole

purpose of causing him pain and (2) that defendants Tarr, Endicott, Dehaan, Janelle Paske, Sandra Hautumaki and Cindy O'Donnell retaliated against him for filing an inmate complaint about a blood test by prolonging his stay in segregation. Jurisdiction is present under 28 U.S.C. § 1331.

(Plaintiff has objected to the state defendant's motion for summary judgment, apparently on the ground that defendants wrote to the court to say that they had no objection to defendant Belfuel's motion to dismiss. I am ignoring the objection. Defendants did not give up their right to file a motion by saying that they did not object to a co-defendant's motion.)

Presently before the court is the motion of defendants Endicott, DeHann, Eckstein, Paske, Tarr, Hautamaki, O'Donnell, Dehn and Ruhland for summary judgment. (Defendant Belfuel has filed his own motion but it is not ready for decision.) I conclude that the motion must be granted because plaintiff has not adduced evidence from which a jury could conclude that defendants violated the Eighth Amendment or retaliated against him for the exercise of his constitutional rights.

Both parties have submitted proposed findings of fact in compliance with this court's Procedures for Summary Judgment Motions. However, plaintiff's responses to defendants' proposed findings of fact either do not cite to record evidence or do not address the facts or issues raised in defendants' proposed findings of fact. Such responses are not adequate

to put defendants' proposed findings of fact into dispute and will be ignored. Consequently, I have accepted defendants' proposed facts as undisputed for the purposes of deciding this motion. I have ignored "facts" proposed by defendants that are conclusions of law or "ultimate facts." See Defs.' Proposed Findings of Fact, dkt. #51, at ¶¶ 41, 42, 45, 66, 89, 96, 111, 112, 114, 115, 116, and 119. I will also refer to the April 1998 version of the Wis. Admin. Code § DOC Chapter 310 throughout the opinion because this version was in effect during the time plaintiff filed his inmate complaints no. RGCI-2002-35284 and no. RGCI-2002-35645.

From the defendants' proposed findings of fact, I find that the following are material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Titus Henderson was incarcerated at Redgranite Correctional Institution at all relevant times. At the Redgranite Correctional Institution, defendant Jeffrey Endicott is the warden, defendant Suzanne DeHaan is the deputy warden, defendant Scott Eckstein is a supervising officer 2 - administrative supervisor (captain) and the acting security director, defendant Janelle Paske is an institution complaint examiner, defendant David Tarr is a supervising officer 2 (captain), defendant Sandra Hautamaki is a corrections complaint

examiner employed by the Wisconsin Department of Corrections, defendant Herbert Dehn is a correctional officer and defendant Paul Ruhland is a correctional officer. Defendant Cindy O'Donnell is the deputy secretary of the Wisconsin Department of Corrections.

B. Plaintiff's Blood Draw

On September 18, 2002, plaintiff had an altercation with Tronnie Dismuke, another inmate at the Redgranite facility. After the incident, Dismuke had blood on his finger and back. The attack took place in the shower area, where several officers conducted a search. During the search, officer Gustke found a black pen with tweezers inserted into its end in a laundry basket. Dismuke identified the item as the weapon plaintiff had used to strike him in the back.

When a serious crime occurs at the institution, the security office contacts the Redgranite Police Department to report the matter. The police department determines whether to investigate and the manner in which the investigation will be conducted. Defendant David Belfuel, a detective with the Redgranite Police Department, decided that access to the inmates was required for the criminal investigation. The institution's security department permitted him to enter the institution to conduct the investigation.

After the altercation, plaintiff was placed in temporary lockup. Shortly thereafter, defendant Belfuel interviewed plaintiff about the incident while defendant Tarr was present.

At that time, defendant Belfuel told plaintiff that he was requesting a blood sample from both plaintiff and Dismuke. In addition, defendant Belfuel stated that the blood sample would be used to determine whose DNA was on the weapon used in the altercation.

On October 1, 2002, defendant Tarr assisted defendant Belfuel with his criminal investigation. From his conversations with defendant Belfuel, defendant Tarr understood that one of the purposes for defendant Belfuel's visit was to obtain a blood sample from both plaintiff and Dismuke. At approximately 3:30 p.m., two correctional officers brought plaintiff into a room where he would have his blood drawn. Shortly before this, defendant Tarr observed that Dismuke's blood had already been drawn. Defendants Belfuel and Tarr were both in the room at the time.

When plaintiff arrived at the door to the room, he stopped and asked what was happening. Defendant Belfuel explained that plaintiff's blood was going to be drawn so that he would be able to determine whose blood was on the weapon used in the altercation. At that time, plaintiff said that he did not want to have his blood drawn and that his blood had already been drawn for DNA purposes in the past. Defendant Belfuel said that he needed a new blood sample for the case presently under investigation. About five minutes after plaintiff arrived at the medical unit, one of the nurses drew his blood.

C. Plaintiff's Complaints and Temporary Lockup

From the date of the altercation on September 18, 2002, until October 30, 2002, plaintiff remained in temporary lockup status . Pursuant to Wis. Admin. Code § DOC 303.11(3), defendant Eckstein performed 7-day reviews on September 26, 2002 and October 2, 2002. On October 4, 2002, plaintiff submitted Offender Complaint RGCI-2002-35284, alleging that the October 1, 2002 DNA test was done in violation of his constitutional rights. The inmate complaint examiner, defendant Paske, recommended that this complaint be dismissed, stating that:

> ICE reviewed Mr. Henderson's complaint that DNA test procedure was in violation of his 4th and 14th Amendment rights. ICE contacted Capt. Eckstein, who said that the procedure was requested and done at the request of outside law enforcement (Det. Belfuel) with assistance of institution HSU and Security Staff (Capt. Tarr) due to the fact that Mr. Henderson is presently housed at RGCI. If Mr. Henderson has issues with the procedure, he may address them to Det. Belfuel or his Department for consideration.

On October 8, 2002, the warden's designee, defendant DeHaan, dismissed the complaint.

Plaintiff appealed this complaint to the corrections complaint examiner, defendant Hautamaki, who recommended affirming the dismissal, stating in part:

> In agreement with and based on the report of the Institution Complaint Examiner, it is recommended this complaint be dismissed. . . . Complainant is presently incarcerated for a felony committed in this state and is thus subject to submission of a DNA sample.

On October 27, 2002, defendant O'Donnell, the DOC secretary's designee, accepted

defendant Hautamaki's recommendation.

Plaintiff asked defendant Endicott to appoint an investigator other than defendant Tarr to look into the alleged battery. On October 15, 2002, defendant Endicott responded to the request, stating that the matter was part of an ongoing investigation. In addition, he commented:

> However, I am curious as to the circumstances that would lead you to request that a second investigator be assigned to determine the facts in this case. If you have information regarding this incident, it should be shared with the investigating officers or Captain Eckstein, who is covering the vacant Security Director position.

On October 10, 2002, defendant DeHaan approved a 21-day extension of plaintiff's temporary lockup placement. This extension was necessary to keep plaintiff out of general population in order to avoid disruption to the possible criminal prosecution and prison disciplinary action. That same day, plaintiff submitted another complaint, no. RGCI-2002-35645, in which he contended that his placement in temporary lockup status violated the Eighth Amendment and state law. After consulting with the security program assistant, defendant Paske recommended that the complaint be dismissed. On October 14, 2002, defendant DeHaan adopted the recommendation and dismissed the complaint.

Plaintiff appealed to defendant Hautamaki, who recommended dismissal, saying that:

> Review of the DOC-67 and DOC-68 shows the requisite paperwork was filled out for extending the complainant's placement in TLU. It is noted that the extension was signed on 10/10/02, or one day after the 21-day time limit had

> expired. I find this to be a harmless error as the purpose for the placement fell under the guidelines as noted under DOC 303.11(4) as the complainant was being held pending investigation for fighting, a serious offense in the correctional setting. Accordingly, it is recommended this complaint be dismissed.

On October 27, 2002, defendant O'Donnell accepted the dismissal, noting:

> The attached Corrections Complaint Examiner's recommendation to dismiss this complaint is accepted as the decision of the Secretary with the following modification: RGCI staff are reminded to follow the requirements of 303.11.

On October 11, 2002, plaintiff sent a letter to defendant Endicott in which he complained about having a blood sample drawn and about his placement in temporary lockup. He claimed that his retention in temporary lockup was in retaliation for filing an Offender Complaint. By this time, defendant DeHaan had already made a decision on plaintiff's complaint no. RGCI-2002-35284.

On October 16 and October 23, 2002, defendant Eckstein performed two more 7-day reviews. On October 30, 2002, plaintiff was placed in adjustment segregation status. On November 7, 2002, he was placed in program segregation status as a result of a guilty finding on a disciplinary conduct report. Plaintiff remained in program segregation until his transfer from RGCI to the Wisconsin Secure Program Facility on January 10, 2003.

OPINION

A. Eighth Amendment Claim

The Eighth Amendment prohibits the unnecessary and wanton infliction of pain. Hudson v. McMillian, 503 U.S. 1, 5 (1992). Because prison officials must sometimes use force to maintain order, a central inquiry for a court faced with an Eighth Amendment claim is whether the force is "so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Plaintiff was granted leave to proceed on a claim under the Eighth Amendment because he could have conceivably made out a violation were he able to show that defendants inserted a needle into his arm for the sole purpose of causing him pain. However, plaintiff has not introduced evidence from which a reasonable juror could conclude that the blood draw was performed solely to cause pain.

1. Personal involvement

Plaintiff argues that defendants Endicott, DeHaan and Eckstein are liable for the actions of their subordinates. However, § 1983 creates a cause of action based upon personal liability. Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d at 869. Consequently, "*an individual*

cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation." McBride v. Soos, 679 F.2d 1223, 1227 (7th Cir. 1983). Courts have rejected the use of respondeat superior theory of liability in § 1983 claims. Iskander v. Village of Forest Park, 690 F.2d 126, 128 (7th Cir. 1982). Plaintiff is simply mistaken in his belief that defendants Endicott, DeHaan and Eckstein may be held liable for the acts of their subordinates. It is necessary to show personal involvement in the constitutional violation by the supervisory official in order to establish liability under § 1983. Wolf-Lillie, 699 F.2d at 869. Because plaintiff has not adduced evidence showing that defendants Endicott, DeHaan or Eckstein were personally involved in drawing plaintiff's blood, they are entitled to summary judgment on this claim.

With respect to the personal involvement of defendants Rehn and Ruhland, plaintiff alleged in his complaint that these defendants held down his arms while the blood sample was being taken. Plaintiff's claim against defendants Dehn and Ruhland fails for at least two reasons. First, plaintiff has supplied no evidence to prove that defendants Dehn and Ruhland actually held his arms down. Defendants proposed as fact that no one held plaintiff's arms down while the blood sample was taken. Defts.' PFOF, dkt. #51, at 6, ¶ 27. In support of this proposed fact, defendants cite the affidavit of defendant Tarr, who was present when plaintiff's blood was drawn. Defendant Tarr avers that no one held plaintiff down. Tarr Aff., dkt. #52, at 3, ¶ 9. In his response, plaintiff argues that this proposed fact

is in dispute and cites to his own affidavit. Plt.'s Resp. to Defts.' PFOF, dkt. #68, at 2. However, in his affidavit, plaintiff avers only that defendant Tarr instructed defendants Dehn and Ruhland to hold down plaintiff's arms and that plaintiff then told them that this was not necessary. Plt.'s Aff., dkt. # 69, at 5, ¶¶ 29 and 32. Nowhere in his affidavit does plaintiff say that defendants Dehn and Ruhland went ahead and held down his arms anyway.

Although plaintiff has not shown that defendants Dehn and Ruhland held down his arms, the Court of Appeals for the Seventh Circuit has held that a prison official may be held liable for a constitutional violation if he knew about it and had the ability to intervene but failed to do so. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). However, this rule "is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees." Windle, 321 F.3d at 663. Recently, the court of appeals made it clear that in order to succeed on a failure to intervene theory, a plaintiff must prove that the defendant failed to intervene with deliberate or reckless disregard for the plaintiff's constitutional right. Fillmore, 358 F.3d at 505-06. Plaintiff has failed to adduce any evidence or advance any argument suggesting that defendants Dehn and Ruhland acted deliberately or recklessly. Accordingly, they cannot be held liable under a failure to intervene theory and are entitled to summary judgment.

2. Legitimate purpose

With respect to defendant Tarr, plaintiff has adduced no evidence suggesting that he participated in the blood draw for the purpose of causing plaintiff harm. To the contrary, the facts reveal that the blood sample was obtained from both plaintiff and inmate Dismuke in order to aid in the criminal investigation of the alleged attack on September 18, 2002. The prison has a real interest in insuring the safety of other inmates. Alston v. DeBruyn, 13 F.3d 1036, 1040 (7th Cir. 1994). Determining which of the inmates involved in the attack utilized the weapon and punishing that inmate helps to insure internal safety and order at the prison by deterring future incidents. Rowe v. DeBruyn, 17 F.3d 1047, 1052-53 (7th Cir. 1994). Because there is no evidence suggesting that plaintiff's blood test involved a "wanton infliction of pain" by defendant Tarr, he is entitled to summary judgment.

B. Retaliation

Plaintiff was granted leave to proceed on his claim that defendants Tarr, Endicott, DeHaan, Paske, Hautamaki and O'Donnell retaliated against him for filing an inmate complaint about the blood draw by prolonging his stay in temporary lock up. Plaintiff cannot now add additional claims in regard to this retaliation claim. His attempt to do so in his motion in opposition to summary judgment will be disregarded.

A prison official who takes action against a prisoner to retaliate against the prisoner's

exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 274 (7th Cir. 1996). However, a prisoner's First Amendment right to free speech may be limited to serve "legitimate penological interests." See Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986). An act taken in retaliation for the exercise of a constitutional right is actionable under § 1983 even though it would have been proper had it been taken for other reasons. Howland v. Kilquist, 833 F.3d 639, 644 (7th Cir. 1987).

In order to make out a prima facie case of retaliation, plaintiff must adduce evidence from which a reasonable jury could conclude that his inmate complaint was a substantial or motivating factor in the decision to extend his stay in temporary lock up. Spiegla v. Hull, 371 F.3d 928, 943 (7th Cir. 2004).

The undisputed facts show that (1) only defendant DeHaan was involved in the decision to extend plaintiff's confinement in temporary lock up and (2) the reason for her involvement was to prevent disruption to the pending criminal and disciplinary investigations that could occur if plaintiff were returned to general population. There is no evidence that defendants Tarr, Endicott, Paske, Hautamaki or O'Donnell were personally involved in the decision to extend plaintiff's time in temporary lock-up.

Plaintiff argues that defendant DeHaan's retaliatory animus is evident from her failure to comply precisely with temporary lock-up procedural requirements.

1. <u>Substantial or motivating factor</u>

Although plaintiff has met the requisite personal involvement threshold with respect to defendant DeHaan, his claim fails because he has not shown that DeHaan's actions were motivated in any way by retaliatory animus. Plaintiff argues that defendant DeHaan's failure to follow certain procedures shows that DeHaan was retaliating against him. Specifically, defendant DeHaan extended plaintiff's temporary lock up confinement one day after the twenty-one day time limit created in Wis. Admin. Code § DOC 303.11(3) had expired. It is not clear why plaintiff believes this shows retaliatory animus. If defendant DeHaan had wanted to punish plaintiff for filing an inmate complaint, there is no reason why she would have waited until the expiration of the time for approving an extension rather than doing so when she first learned of the complaint on October 8, 2002.

The only evidence either party submitted regarding the motivation of defendant DeHaan is located DeHaan's own affidavit. She averred that the extension was necessary to prevent potential disruption to the on-going criminal and disciplinary investigations against plaintiff.

Because plaintiff has not met his burden of showing that defendants Tarr, Endicott, DeHaan, Paske, Hautumaki and O'Donnell retaliated against him for filing an inmate complaint about the blood draw by prolonging his stay in segregation, defendants' motion for summary judgment will be granted with respect to plaintiff's First Amendment retaliation

claim.

ORDER

IT IS SO ORDERED that the motion for summary judgment of defendants Jeffrey Endicott, Suzanne DeHaan, Scott Eckstein, Janelle Paske, David Tarr, Sandra Hautamaki, Cindy O'Donnell, Herb Dehn and Paul Ruhland is GRANTED with respect to plaintiff Titus Henderson's claims of a violation of his Eighth Amendment Rights and of retaliation for the exercise of his constitutional rights.

Entered this 10th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge