IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SCOTT REIDELL,

Plaintiff,

OPINION AND ORDER

v.

05-C-667-C

CO RON GRAY, in his individual capacity,

Defendant.

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The question in this civil action for monetary relief under 42 U.S.C. § 1983 is whether defendant Ron Gray, an officer at Jackson Correctional Institution, violated the Eighth Amendment rights of plaintiff Scott Reidell, a prisoner, when plaintiff fell while exiting a van. Defendant has filed a motion for summary judgment, which I conclude must be granted because plaintiff has adduced no evidence that defendant acted either with the intent to harm him or with deliberate indifference to a risk of serious harm to his health or safety.

As with so many pro se parties (and some parties with counsel as well), plaintiff had difficulty complying with this court's summary judgment procedures, which the court mailed

to him with the magistrate judge's March 9, 2006 preliminary pretrial conference order and again after defendant filed his motion for summary judgment. At the same time, plaintiff would have received the memorandum from the court for pro se parties that explains these procedures and identifies common problems and solutions. Despite these guidelines, plaintiff failed to comply with some basic requirements.

First, in responding to defendant's proposed findings of fact, plaintiff failed to cite any evidence in instances in which he disputed facts, as is required by Procedure II.D.2 and is further explained in the pro se memorandum. Under the procedures, if a proposed fact is not properly disputed with a citation to evidence in the record, the fact is deemed admitted for the purpose of summary judgment. Second, although plaintiff filed his own affidavit, he did not submit any of his own proposed findings of fact. Parties are not required to submit their own proposed findings, but it is often necessary to do so in order to tell the complete story. Further, proposed findings of fact are important because the court will generally not consider evidence that is not included in proposed findings. See Helpful Tips for Filing a Summary Judgment Motion in Cases Assigned to Judge Barbara B. Crabb, at Tips # 1 and 2.

In this case, however, even if I considered the admissible evidence plaintiff submitted despite his failure to propose any findings of fact, it would make no difference to the outcome of this case. Accordingly, I find from the record as a whole that the following facts

are undisputed. (Plaintiff included additional allegations in his response to defendant's proposed findings of fact that were not included in his affidavit, the only evidence he submitted in opposition to defendant's motion for summary judgment. I did not consider these allegations because they do not meet the requirements for admissible evidence under Fed. R. Civ. P. 56. Collins v. Seeman, – F.3d –, 2006 WL 2588960, *4 n.1 (7th Cir. Sept. 11, 2006) (unsworn statements are not admissible in opposing or supporting motion for summary judgment).)

UNDISPUTED FACTS

Plaintiff Scott Reidell is a prisoner at the New Lisbon Correctional Institution. Defendant Ronnie Gray is a correctional officer at Jackson Correctional Institution, where plaintiff was incarcerated before September 2004.

On August 3, 2004, defendant and two other officers transported plaintiff to a medical appointment at University of Wisconsin Hospital and Clinics. During transport, plaintiff wore leg irons and a waist chain with cuffs.

Upon arrival, defendant stood outside the van, holding on to plaintiff's waist chain as plaintiff exited, back first. Plaintiff lost his balance, defendant let go and plaintiff fell on his back. Defendant did not hold on because "the full force of [plaintiff]'s body was falling toward" him. Defendant told plaintiff to lie still so that he could determine whether plaintiff

had any injuries. Several minutes later, defendant and another officer helped plaintiff to his feet and escorted him to the "lock up" area of the facility. Defendant examined plaintiff's lower back and saw no broken skin or swelling. Several hours later, plaintiff was seen by a nurse, who ordered an x-ray and gave plaintiff Ibuprofen.

OPINION

Plaintiff's sole remaining claim in this case is that defendant violated the Eighth Amendment when plaintiff fell on his back while exiting a van. Both the court and the parties have been analyzing plaintiff's claim as one of excessive force. Under that standard, the plaintiff must show that he suffered more than a minimal injury and that the defendant used force against him "maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 7 (1992). In other words, plaintiff must show that defendant *intended* to harm him.

The facts of this case, however, do not fit squarely in the framework established to evaluate most excessive force cases, which generally involve an officer assaulting a prisoner in the course of disciplining him. See, e.g., Hudson, 503 U.S. at 4 (prisoner beaten by officers); Whitler v. Albers, 475 U.S. 312, 315-16 (prisoner shot by officer); Fillmore v. Page, 358 F.3d 496 (7th Cir. 2004) (prisoner handled roughly during transfer); DeWalt v. Carter, 224 F.3d 607, 620 (7th Cir. 2000) (prisoner shoved); Thomas v. Stalter, 20 F.3d

298, 301-02 (7th Cir. 1994) (prisoner punched). Rather, because this case involves a prisoner falling, it may be more appropriate to use the standard employed when a prisoner alleges that an officer failed to protect him.

Under a failure to protect standard, the plaintiff must show that the defendant was "deliberately indifferent" to a risk of serious harm to the plaintiff's health or safety. Farmer v. Brennan, 511 U.S. 825, 828 (1994). In other words, the plaintiff must show that the defendant knew that there was a substantial risk that the plaintiff could be seriously harmed, but did not protect the plaintiff from that harm even though he could have done so reasonably. This framework is not a perfect fit either, however, because it generally involves a considered decision, not a split second choice like the one at issue here. See, e.g., Farmer, 511 U.S. at 829-31 (decision not to house transgender prisoner in protective custody); Helling v. McKinney, 509 U.S. 25, 27-28 (1993) (decision to house prisoners where they would be exposed to second hand smoke); Wilson v. Seiter, 501 U.S. 294, 296-97 (decisions regarding conditions of confinement, including overcrowding, sanitation and heating).

Which framework is more appropriate in this case may depend in part on the evidence adduced by plaintiff. To the extent that plaintiff could show that defendant *caused* him to fall by pushing or pulling him, an excessive force standard may be appropriate, because that would be more akin to an assault. Alternatively, to the extent that plaintiff means to argue only that defendant *failed to prevent* him from falling, this would be more

similar to cases such as Farmer, which involved a failure to protect the prisoner. I need not belabor this point, however, because plaintiff has not shown that he is entitled to a trial under either standard.

With respect to the standard in Hudson, plaintiff has adduced no evidence that defendant intentionally harmed him. The only facts supported by admissible evidence are that plaintiff lost his balance and defendant let go of him. A reasonable jury could not infer on the basis of these facts alone that defendant wanted to hurt plaintiff. Russell v. Acme-Evans Co., 51 F.3d 64, 70 (7th Cir. 1995)(to survive motion for summary judgment, plaintiff must adduce enough evidence to allow reasonable jury to find in his favor). There is no evidence that defendant caused plaintiff to lose his balance or that the reason defendant let go was that he wanted plaintiff to be hurt. Perhaps defendant could have done more to prevent plaintiff from losing his balance, but failing to prevent an accident is very different from intentionally causing harm.

This leads to an analysis under Farmer. Under that standard, a plaintiff need not prove that a defendant intended to harm him, only that he knew harm was likely. Davis v. Carter, 452 F.3d 686, 696 (7th Cir. 2006). In a case like this, in which events happened so quickly, one wonders whether defendant had the time to consider the effect that his letting go would have on plaintiff. Farmer, 511 U.S. at 837 (to be liable for failure to protect, "the official must both be aware of facts from which the inference could be drawn

that a substantial risk of serious harm exists, and he must also draw the inference"). Even if I assume that defendant consciously decided to let go of plaintiff despite realizing that plaintiff was likely to be hurt, plaintiff must show also that this was an unreasonable response. The undisputed facts show that defendant let go of plaintiff as plaintiff was falling toward him. Thus, defendant's choice was to let go or face potential crushing by plaintiff. The Eighth Amendment requires officers to take reasonable steps to prevent obvious risks to safety, but it does not require them to sacrifice their own safety.

Even if plaintiff could show that defendant was deliberately indifferent to his safety, he would still have to show that he was seriously harmed by the incident. Although it is undisputed that plaintiff was in some pain after the fall, plaintiff did not present evidence that he suffered from the kind of debilitating, long lasting pain that is necessary to satisfy Eighth Amendment standards. Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996) ("minor aches and pains" do not rise to Eighth Amendment violation).

Both in his affidavit and in his responses to defendant's proposed findings of fact, plaintiff includes a number of allegations suggesting that defendant failed to take appropriate steps *after* the fall to insure that he received prompt medical attention. See, e.g., Aff. of Plt., dkt. #28, at ¶12 ("Plaintiff had to suffer for hours before he received medical attention for his back causing needless pain and suffering."). However, I cannot consider these allegations because they go beyond the scope of plaintiff's complaint, which addressed the fall only, not

any failure of defendant to provide him with appropriate medical care after the incident. (Plaintiff did include allegations in his complaint about the lack of treatment he received once he returned to the prison, but he dismissed this claim voluntarily after I requested clarification from him. January 4, 2006 Order, dkt. #7.) Plaintiff may not introduce a new claim into the lawsuit at this late date, particularly when he never moved to amend his complaint. See, e.g., Cleveland v. Porca Co., 38 F.3d 289, 297 (7th Cir.1994)(upholding decision to deny new claim when summary motion had already been briefed).

What happened to plaintiff when he exited the van was undoubtedly an unfortunate incident and perhaps somewhat embarrassing as well. It may also be true that defendant did not handle the matter as plaintiff thinks he should have or was not as sensitive as he could have been to plaintiff's situation. Thus, it is understandable that plaintiff would be upset by the events of that day. The Eighth Amendment, however, provides relief only in limited circumstances, which do not include accidents or insensitive treatment. Because a reasonable jury could not find that defendant violated plaintiff's Eighth Amendment rights, defendant's motion for summary judgment will be granted. As a result, I need not consider defendant's alternative argument that he is entitled to qualified immunity.

ORDER

IT IS ORDERED that Defendant Ron Gray's motion for summary judgment is

GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 6th day of October, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge