IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TERRANCE EDWARDS,

Petitioner,

ORDER

v.

08-cv-352-bbc

MICHAEL THURMER, Warden,
JEREMY STANIEC, JOE BEAHM,
TRAVIS CAUL, J. HAWKINS, Sgt.
ERIC KRUEGER, DODGE COUNTY,
STATE OF WISCONSIN, and
BRIAN GREFF, Lt.[1]

Respondents.

- -

In this proposed civil action for injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983, petitioner Terrance Edwards contends that respondents Michael Thurmer, Jeremy Staniec, Joe Beahm, Travis Caul, J. Hawkins and Eric Krueger used excessive force against him and sexually assaulted him in violation of his Fourth and Eighth Amendment rights. Petitioner has requested leave to proceed in forma pauperis and has paid the initial partial filing fee.

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[1]As explained in the opinion, I have modified the caption to add respondents Dodge County, State of Wisconsin and Lt. Brian Greff pursuant to attachments to the complaint (dkts. ## 6 and 7).

As an initial matter, I note that in a communication dated July 16, 2008 (Dkt. #7), petitioner asks to add the State of Wisconsin and "Lt. Brian Greff" as respondents in this case. Also, in a communication dated June 30, 2008 (Dkt. #5), petitioner asks to add a request for punitive damages to his complaint and, in a communication dated July 6, 2008 (Dkt. #6), he asks to add Dodge County as a defendant and increase the amount of his request for punitive damages.

In this court, when a petitioner wishes to amend his complaint, he is required ordinarily to file a completely new complaint that will replace the original complaint. Moreover, to make it simpler for the court and the respondents to understand what changes the petitioner is making, this court asks that the petitioner submit a proposed amended complaint that looks exactly like the original complaint except that the petitioner is to point out any new respondents or new allegations by highlighting them and he is to make clear what he wants omitted from the complaint by putting a line through any allegations or parties he no longer wishes included in the complaint. As a general rule, it is inappropriate for petitioner to file an original complaint, and then add a communication later that makes one change, and another communication a week later making another change, and another a week later making yet another change. A complaint cannot be a moving target. At some point, it has to be finished so that the respondents know precisely what it is that they are being charged with doing and what the petitioner wants as relief.

Here, because petitioner's original complaint has not yet been served on the respondents, and because the changes petitioner wishes to make to his complaint are clearly described and discrete changes, I am willing to consider dkts. ## 6 and 7 as attachments to the complaint. Dkt. #5 will be disregarded as moot because it contains nothing more than a request for an amount of punitive damages that petitioner has changed in dkts. ## 6 and 7.

Turning to petitioner's request for leave to proceed in forma pauperis, because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if petitioner has had three or more lawsuits or appeals dismissed for lack of legal merit or if his complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a respondent who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2). Because petitioner is a pro se litigant, his complaint will be construed liberally as it is reviewed for these defects. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Petitioner will be granted leave to proceed in forma pauperis on one claim and denied leave to proceed on the other. Because petitioner has alleged that respondents Thurmer, Staniec, Beahm, Caul, Hawkins and Krueger inflicted unnecessary injury upon him when he was restrained and respondent Greff was present but failed to intervene, he will be granted leave to proceed on his claim that these respondents used excessive force against him in

violation of his Eighth Amendment rights. However, petitioner will be denied leave to proceed on his claim that respondent Greff violated his Eighth Amendment rights by requiring him to wash off gas causing a burning sensation using a sink instead of a shower because respondent Greff's response to petitioner's request did not amount to deliberate indifference. In addition, petitioner will be denied leave to proceed on his claim that respondents violated his Fourth and Eighth Amendment rights by subjecting him to a manual inspection of his anus and genitals because the allegations show they had a legitimate penological reason for performing the manual inspection. Finally, respondents Dodge County and State of Wisconsin will be dismissed from the case because they are not "persons" liable to suit under 42 U.S.C. § 1983.

Finally, petitioner has filed a motion for appointment of counsel (dkt. #4). That motion will be denied because he has failed to show that he has made reasonable efforts to find a lawyer on his own and at this early stage counsel does not appear necessary.

From petitioner's complaint and its attachments, I draw the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Petitioner Terrance Edwards is an inmate at the Waupun Correctional Institution.

Respondent Michael Thurmer is the warden and respondents Jeremy Staniec, Joe Beahm, Travis Caul, J. Hawkins and Eric Krueger are correctional officers at the Waupun Correctional Institution.

B. The Incident

On about April 19, 2008, petitioner was housed in the segregation unit at the Waupun Correctional Institution. After petitioner took a shower that day, he put on his clothes, then broke the razor he was given, removed the blade and started cutting his left arm.

While attempting to restrain petitioner, respondents used force. First, respondent Hawkins twice discharged incapacitating gas in the shower. Then, when petitioner was partially restrained, respondents Staniec and Hawkins started kicking petitioner in his hip and ribs; respondent Caul hyper-extended petitioner's wrist while respondent Krueger banged petitioner's head against the steel shower door. After petitioner was fully restrained with waist, hand and leg restraints, respondent Beahm held his head back and choked him. Petitioner was led to the "strip cage" and was cuffed to the door. There, respondent Krueger hyper-extended petitioner's right wrist. Petitioner responded by stating "Why the fuck are you trying to break my wrist?" Someone yelled "stop resisting," respondent Krueger continued to hyper-extend his wrist and either respondent Caul or Beahm bashed his head

up against the steel door. Respondent Greff threatened petitioner with a taser, turning it on and off. Respondent Staniec cut off petitioner's clothing, "fondled" his groin and spread his buttocks.

Petitioner was then taken to the nurse. Petitioner suffered a soft lump on his head and bruises to his ribs and hip that were "not apparent." To this day, petitioner continues to suffer migraine headaches and numbness in his fingers.

After petitioner saw the nurse, he was escorted to the observation cell. Petitioner noticed that the cell was complete with a shower and asked respondent Greff if he could wash off the gas that was burning him. Respondent Greff gave petitioner a "nasty look" and said "No, wash it off in the sink." The sink was not sufficient, so petitioner experienced a burning sensation during his stay in observation.

OPINION

A. Excessive Force

In determining whether an officer has used excessive force against a prisoner, the question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320 (1986). The factors relevant to making this determination include:

- the need for the application of force

- the relationship between the need and the amount of force that was used
- the extent of injury inflicted
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them
- any efforts made to temper the severity of a forceful response

Id. at 321. In Hudson v. McMillan, 503 U.S. 1, 9-10 (1992), the Court refined this standard, explaining that the extent of injury inflicted was one factor to be considered, but the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force.

In this case, petitioner alleges that respondents Thurmer, Staniec, Beahm, Caul, Hawkins and Krueger inflicted unnecessary injuries after he was partially and fully restrained and that respondent Greff was present but failed to intervene. If this is true, petitioner may be able to prove that force was applied for the sole purpose of causing him harm. Accordingly, I will allow petitioner to proceed on his claim of excessive force against these respondents.

B. Deliberate Indifference to Serious Medical Need

Petitioner complains that respondent Greff refused to allow him to shower to wash off the gas that was causing him to experience a burning sensation. The Eighth Amendment

prohibits prison officials from acting with deliberate indifference to prisoners' serious medical needs. Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state such a claim, petitioner's complaint must allege facts showing that respondent was aware that petitioner had a serious medical need, such as serious pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), but failed to take reasonable measures to insure proper treatment. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). The complaint allows for an inference to be drawn that respondent Greff knew that petitioner was in some "pain" by experiencing a burning sensation. However, respondent Greff addressed petitioner's concerns, suggesting that petitioner wash the gas off in the sink. Although petitioner alleges that his rinse in the sink was not sufficient, it would be speculation to infer that respondent Greff knew that the sink would not be effective in washing off the gas. Because the complaint does not allow an inference that respondent Greff was deliberately indifferent to petitioner's needs, petitioner's allegation that respondent Greff failed to respond adequately to his request for a shower fails to state a claim upon which relief may be granted and petitioner's request for leave to proceed in forma pauperis on this claim will be denied.

C. Sexual Assault

A strip search is almost always uncomfortable and embarrassing for the subject of the search. This is not surprising when one considers that, under ordinary circumstances, the

acts constituting a strip search could be criminally prosecuted as a sexual assault. Most of us would cringe at even the thought of being forced to submit to such treatment. In the prison context, in which many inmates are already highly sensitive to the vast power differential between them and prison authorities, the sense of vulnerability caused by the search can only be heightened.

For these reasons, many prisoners might be surprised to learn that the circumstances are very limited under which a strip search conducted in the prison setting violates the constitution. Both the Supreme Court and the Court of Appeals for the Seventh Circuit have concluded that the privacy rights of prisoners are severely curtailed. Hudson v. Palmer, 468 U.S. 517, 527 (1984); Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994). Those courts have concluded that because security is of paramount concern in a prison, officials must have great discretion in determining when and what kind of search is appropriate.

Even in the context of strip searches, prison officials do not need particularized suspicion of wrongdoing. Peckham v. Wisconsin Dept. of Corrections , 141 F.3d 694, 695 (7th Cir. 1998) (upholding various routine strip searches of prisoner, including those that occur "whenever prison officials undertake a general search of a cell block"). Rather, the court of appeals has held that as a general matter the Eighth Amendment governs the constitutionality of strip searches and that, under that standard, the question is whether the search was "conducted in a harassing manner intended to humiliate and inflict psychological

pain." Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003). Thus, so long as the officers conducted the search for the purpose of finding contraband or for another legitimate purpose, the search is not unconstitutional simply because the prisoner believes that officials had no reason to suspect that he was hiding anything.

In this case, petitioner alleges that officers subjected him to a manual inspection of his anus and genitals. As I have held recently, a failure to permit a prisoner to comply with a visual inspection before conducting a manual inspection could constitute an unreasonable search if there was no legitimate penological reason for proceeding directly to the more intrusive manual inspection. Vasquez, 480 F. Supp. 2d at 1131-32.

In this case, it appears that petitioner was never given an opportunity to comply with a visual inspection. However, a visual inspection was not an option under the circumstances: petitioner alleges that he was restrained with waist, hand and leg restraints and had been cuffed to a steel door. Moreover, petitioner had been restrained for an obviously legitimate reason: he had been seen trying to cut himself with a razor. Because in this case petitioner's allegations show that the officers had a legitimate reason for conducting a manual inspection on him, petitioner's request for leave to proceed on this claim will be denied.

D. Respondents State of Wisconsin and Dodge County

Although in the attachments (dkts. ## 6 and 7) petitioner adds respondents State

of Wisconsin and Dodge County, neither of these respondents is a "person" under 42 U.S.C. § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 66-67 (1989). Because liability under § 1983 attaches only to "persons," petitioner's claims against both of these respondents must be dismissed from the case.

E. Motion for Appointment of Counsel

Finally, petitioner has moved for appointment of counsel. In deciding whether to appoint counsel, I must first find that petitioner has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, petitioner must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Until petitioner provides the required proof that he has made reasonable efforts to find a lawyer on his own, I cannot consider whether it is appropriate for the court to request a lawyer to represent him.

However, even if petitioner had submitted proof that he has already made reasonable efforts on his own, I would have to deny his motion for appointment of counsel at this time. In determining whether it is appropriate to request that a lawyer represent a pro se plaintiff, the court must consider "whether the difficulty of the case-factually and legally-exceeds the

particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007). Plaintiff raises a straightforward Eighth Amendment claim of excessive force, in which his own testimony will likely be his primary evidence. At this early stage of the lawsuit, there is nothing in the record to suggest that his case is factually or legally difficult or that petitioner is incapable of gathering and presenting evidence to prove his claims. Therefore, the motion will be denied without prejudice to plaintiff's renewing his request at a later time.

ORDER

IT IS ORDERED that

1. Petitioner Terrance Edwards's request for leave to proceed in forma pauperis is GRANTED on his claim that respondents Michael Thurmer, Jeremy Staniec, Joe Beahm, Travis Caul, J. Hawkins, Eric Krueger and Brian Greff used excessive force against him in violation of the Eighth Amendment.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claim that respondent Brian Greff acted with deliberate indifference to his serious medical needs by requiring him use a sink instead of a shower to rinse off gas causing petitioner to experience a burning sensation.

3. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claim

that respondents sexually assaulted him by subjecting him to a manual inspection of his anus and genitals.

4. All of petitioner's claims against respondents Dodge County and State of Wisconsin are DISMISSED from the case.

5. Petitioner's motion for appointment of counsel (dkt. #4) is DENIED without prejudice.

6. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

7. Petitioner should keep 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.

8. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and attachments (dkts. ## 6 and 7) and this order are being sent today to the Attorney General for service on respondent.

9. Because I have dismissed a portion of plaintiff's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against plaintiff.

Entered this 29th day of July, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge