IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HAKIM NASEER,

Plaintiff,

v.

MARY MCCULLICK and
JANET FISCHER,

Defendants.[1]

OPINION and ORDER

10-cv-139-bbc

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This is a prisoner civil rights case in which plaintiff Hakim Naseer contends that defendants Mary McCullick and Janet Fischer violated his Eighth Amendment rights by slamming his arm in a trap door on his cell door. Now before the court is defendant's motion for summary judgment and two motions for sanctions filed by plaintiff. I will deny the motions for sanctions and grant the motion for summary judgment.

Plaintiff seeks sanctions for defendants' alleged false statements and for defense counsel's assertion that plaintiff's multiple briefs on the issue can be "harmonized" into one.

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[1] Plaintiff named defendants "M. McCullick" and "J.D. Fisher." In their summary judgment submissions, defendants provide their full names spelled correctly. I have amended the caption accordingly.

Neither request is warranted. First, the allegedly false statements relate to whether the nurse or nurses examining plaintiff after the incident believed that there were "no injuries" or saw that plaintiff's "arm was slightly reddened" and whether he was masturbating inside the meal box or simply appeared to be doing so. Neither of these disputes are crucial, and no sanctions are warranted for nitpicking. Along the same lines, the second motion involves a statement by defense counsel that two of plaintiff's briefs can be "harmonized" into one. Whether briefs can be "harmonized" is irrelevant to the questions before the court. Even if it mattered, however, it turns out that plaintiff is simply misunderstanding defense counsel, who is not seeking to treat the first motion for sanctions as another opposition brief, but instead is referring to separate documents plaintiff filed, dkts. ##111 and 112, both in opposition to defendants' summary judgment motion.

Defendants' motion for summary judgment must be granted because no reasonable jury could find that defendants engaged in excessive force in light of the undisputed facts describing the context of the incident and the video footage of the incident, which establish that defendants had a reason to try to shut the trap door and did not apply more than minimal force in the attempt.

In finding which of the proposed material facts are in genuine dispute, I have taken into account the facts proposed by defendants, plaintiff's response to the proposed facts and supporting affidavit and the video filed with the court by defendants. A word about the

video. Ordinarily, in deciding a motion for summary judgment, a court is to read the proposed facts in the light most favorable to the non-moving party, reserving for the jury the task of resolving disputes. Thus, if the moving party, such as defendants in this case, proposes as fact that they moved the trap up slowly and stopped when it came in contact with his hand, and the plaintiff proposes as fact that the trap came up quickly and slammed into his hand, a jury would have to decide which one to believe.

In Scott v. Harris, 550 U.S. 372 (2007), the Supreme Court considered how courts should treat a video of the disputed facts in determining whether material facts are in dispute. In Scott, the video depicted a high speed chase involving Harris and Scott, a Georgia county deputy. Harris was injured in the chase and sued, alleging that he had been subjected to an unreasonable seizure under the Fourth Amendment. Scott moved for summary judgment, asserting that he was entitled to qualified immunity from suit. The district court denied the motion, finding that there were material issues of fact requiring jury determination. The court of appeals affirmed the decision. The Supreme Court granted certiorari and reversed, finding that the lower courts had erred in viewing the facts in the light most favorable to Harris, the non-moving party. That approach is correct, the Court said, only when there is a "genuine" dispute as to those facts. When, as in the case before it, a videotape captures the events in question and clearly contradicts the non-moving party's version of the events, "a court should not adopt that version of the facts for purposes of

ruling on a motion for summary judgment." Id. at 380. Harris's "version of the events [was] so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." Id. at 380-81.

In this case, the videotape submitted by defendants contradicts plaintiff's averments about how the trap was closed, so these averments must be disregarded. In particular, plaintiff avers that after a box was removed to allow the trap door to be closed, defendant McCullick waited until plaintiff extended his arm "even further outside the trap" before she "decide[d] to take forceful action on the trap by ramming [plaintiff's] arm up and into the upper area of the metal door." Dkt. #114, at 6. As explained below, the video portrays something quite different.

UNDISPUTED FACTS

Plaintiff Hakim Naseer is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendants Janet Fischer and Mary McCullick are correctional officers at the prison. On October 9, 2009, plaintiff had a cell on Alpha Range I and had been placed on "back of cell" restrictions. Prisoners receive back of cell restrictions for harming or attempting to harm staff, grabbing at staff or seizing items from staff, throwing items or liquids out of traps, resisting staff, opening or closing traps or threatening to do any of these

things. Prison officials use "back of cell precautions" against prisoners with this restriction. These precautions include providing food on a styrofoam tray and delivering the tray through the trap using a "meal delivery box."

After plaintiff received his breakfast tray on October 9, 2009, he refused to hand out his tray and made derogatory comments about defendant McCullick. At lunchtime, plaintiff complied with the back of cell procedure and defendant Fischer retrieved his breakfast tray. Plaintiff continued to comply with the procedure while his lunch tray was placed in a meal delivery box and inserted into the trap on the cell door.

The next step for a prisoner in the back of cell procedure is to take his meal out of the delivery box and return to the back of the cell while the box is being removed. Plaintiff did not do this, but instead inserted his hand into the back of the meal delivery box and turned off his cell lights and began licking his lips and shaking. With his other hand, plaintiff appeared to be masturbating. (The parties dispute whether he actually masturbated or simply was "role-playing" or pretending to masturbate because he was angry about the lack of fat free milk on the tray.)

Several times Fischer ordered plaintiff to go to the back of the cell, turn on his cell lights and kneel at the back down, as required by the back of cell restrictions. Plaintiff did not comply with any of Fischer's orders. It was possible that plaintiff could attempt to reach out and assault Fischer when the box was removed. (The parties dispute whether there was

also a real threat that plaintiff could ejaculate through the trap.) Because of plaintiff's behavior, history, body size and perceived threats to defendants, McCullick and Fischer decided to disengage and leave the area.

McCullick positioned herself along the side of the cell door, with Fischer remaining in front of the door. Fischer grabbed the meal delivery box and pulled it back, removing it from the trap as she stepped backward. Plaintiff extended his arm through the trap before McCullick could close the trap. (The parties dispute whether plaintiff started extending his arm through the trap before the box had been completely removed.)

As soon as the meal delivery box was removed from the trap or very shortly thereafter, McCullick began lifting the trap with plaintiff's arm still extended through it. McCullick lifted the trap slowly, "as high as she could based on plaintiff's level of resistance," but then released the trap as plaintiff kept his arm extended through the trap. (Defendants aver that McCullick "held" the trap up to let Fischer remove the box and leave, but the video does not show that; instead, it shows the box fully removed before the trap was lifted and shows McCullick releasing the trap after lifting it up in an attempt to close the trap. Only after McCullick released the trap did Fischer attempt to leave the area.) McCullick's attempt to close the trap lasted for approximately one second. (Plaintiff avers that McCullick "rammed" the trap into his arm, but the video shows her moving the trap slowly upward for about a second and then releasing it, with no "ramming.")

After McCullick released the trap, Fischer and McCullick left the area without making further attempts to close the trap . McCullick stepped backward from where her location on the side of the cell and continued to move away from the door. Fischer had stepped backward during her removal of the box and she kept back from the trap as she moved from the front of the trap to the side and out of the area. She did not hold the trap up as a shield between her and plaintiff as she moved away from the trap. Both Fischer and McCullick turned their backs on the trap before leaving the area completely, but did not place themselves immediately in front of the trap.

Plaintiff received an ice pack some time after the incident. His arm was discolored, sensitive and tender to the touch, and for three days after the incident, "sleeping, writing, eating, showering and dressing was extremely difficult and painful" for him. Dkt. #112, at 11. (The parties attempt to dispute whether a nurse examining plaintiff after the incident saw any visible injuries, but neither party submits admissible evidence on the matter. Defendants submitted an affidavit to that effect that relies on hearsay evidence and plaintiff proposed statements that lack foundation and he submitted an excerpt from an unauthenticated document that also appears to rely on hearsay.)

OPINION

Plaintiff's claims against defendants turn on whether defendant McCullick used excessive force against him when she attempted to close the trap with plaintiff's arm sticking out of it. (His claim against defendant Fischer is that she failed to intervene when McCullick used the force she did against plaintiff.) To determine whether prison officials' use of force on a prisoner was "excessive" in violation of the Eighth Amendment, a court must determine "whether [the] 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; and
- any efforts made to temper the severity of a forceful response.

Id. at 321.

In this case, the undisputed facts and video footage show that the force in question involved no more than a slow application of upward force on the trap for about one second while plaintiff's arm was still extended through the trap. Plaintiff identifies no serious injury

that resulted from the incident, although he tries, averring that performing everyday acts became painful and difficult for three days after the incident. However, plaintiff's averment is too vague to achieve what he hopes it will, which is to allow an inference that he suffered a serious injury because of the incident.

In particular, plaintiff does not describe the "pain" or "difficulties" he experienced using his arm, does not describe the degree of pain or difficulty he was experiencing and, most important, does not even attempt to explain how his pain or difficulty came about as a result of any pressure from the trap. This is particularly important because the video does not show his arm being subjected to a high level of force consistent with a severe injury. Although the facts must be construed in a light most favorable to plaintiff at this stage, this does not allow a jury to draw positive inferences from vague statements. To allow otherwise would allow a party to avoid perjury while overcoming summary judgment simply by remaining vague.

The facts of this case are strikingly similar to those in Outlaw v. Newkirk, 259 F.3d 833, 834-37 (7th Cir. 2001), a case in which the Court of Appeals for the Seventh Circuit found no Eighth Amendment violation. In that case, a prison official closed a cuffport door on the prisoner's hand when the prisoner placed his hand in the cuffport while holding some garbage. The prisoner submitted evidence that he suffered "slight swelling" to his hand, "decoloration," tenderness and even difficulty moving his fingers. Id. at 839. The court

concluded that

> Even viewing the facts in a light most favorable to Outlaw, a rational jury could draw one of only two possible conclusions: that the incident was an accident, or that Mable deliberately and perhaps unnecessarily applied a relatively minor amount of force to achieve a legitimate security objective. Neither scenario would involve a use of force that was "repugnant to the conscience of mankind."

Id. In addition, the court noted that "the minor nature of [the plaintiff's] injuries strongly suggests that the force applied by [the defendant] was *de minimis*." Id.

The facts of this case establish that defendant McCullick applied a minimal amount of force to address the threat of plaintiff making physical contact with one of defendants. The application of force was brief and there is no evidence that the injury resulting from the force used was anything more than minor. (Even assuming his 3-day pain was caused by the force used in the incident, there is no evidence that it resulted in long-term problems.) Plaintiff argues that the evidence shows that defendants did not believe he was a threat because they turned their backs on him as he left. What he fails to mention, however, is that defendants turned their backs on plaintiff when they were out of his reach and no longer directly in front of the trap.

Next, plaintiff contends that the amount of force was unreasonable because, although he suffered only minor injuries, he was not attempting to physically harm defendants. He maintains that merely refusing to follow an order is not a reason for him to be subjected to

injury. Plaintiff cites several cases he believes supports his position: Corselli v. Coughlin, 842 F.2d 23, 26-27 (2d Cir. 1988); Martinez v. Rosado, 614 F.2d 829, 830-32 (2d Cir. 1980); Felix v. McCarthy, 939 F.2d 699, 702 (9th Cir. 1991). All of these cases are markedly different from the present case. In Corselli, 842 F.2d at 25, the court of appeals found that plaintiff's version of the incident in question could give rise to an excessive force claim, but in that case the plaintiff averred that the prison official had punched him in the back of the head after the plaintiff called the official him a name and turned away. In Martinez, 614 F.2d at 830, the plaintiff alleged that he had done nothing more than refuse to follow orders and the defendant "seized and severely beat" him. Finally, in Felix, 939 F.2d at 700, the defendant spit on the floor, ordered the plaintiff to clean it up and after the plaintiff refused, handcuffed him and pushed him into a wall.

Each of the cases plaintiff cites involves the use of force far out of proportion to legitimate security concerns of the prison officials, if any even existed. Moreover, none of these cases suggest that force can never be applied to a prisoner until the prisoner threatens harm, as plaintiff appears to believe.

In conclusion, no reasonable jury could find McCullick's measured response to the threat plaintiff posed as having been meted out maliciously and sadistically for the very purpose of causing harm. Whitley, 475 U.S. at 320. At most, she was trying to see whether pressure on plaintiff's arm would convince him to retract his arm so the trap could be shut.

Therefore, I will grant defendants' motion for summary judgment on plaintiff's excessive force claims against defendants.

One final point warrants mention. In his opposition brief, plaintiff asserts a new claim for retaliation and contends that defendants retaliated against him. He was not allowed to proceed on a claim of retaliation against defendants and will not be given leave to amend his complaint now that he has lost his excessive force claim.

ORDER

IT IS ORDERED that

1. Plaintiff Hakim Naseer's motions for sanctions, dkts. ##115 and 119, are DENIED.

2. The motion for summary judgment filed by defendants Janet Fischer and Mary McCullick, dkt. #102, is GRANTED. The clerk of court is directed to enter judgment in defendants' favor and close this case.

Entered this 24th day of May, 2011.

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