IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LARRY BRACEY,

ORDER

Plaintiff,

10-cv-287-bbc

v.

RICK RAEMISCH, PETER HUIBREGTSE,
JAMES GRONDIN, C.O. HUNT,
THOMAS TAYLOR, C.O. MURRAY,
C.O. KOELLER and JOLINDA WATERMAN,

Defendants.

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This is a proposed civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Larry Bracey contends that defendants Grondin, Hunt, Taylor, Murray and Koeller violated his Eighth Amendment right to be free from excessive force when they assaulted him while conducting a random cell search and transporting him to a segregation unit. Plaintiff contends that defendants Raemisch and Huibregtse allowed the assault to occur by maintaining a prison policy that permits prison officials to use excessive physical force against inmates. Also, plaintiff contends that defendant Waterman acted with deliberate indifference to petitioner's medical condition

when she failed to examine his head injuries. Finally, plaintiff asserts state law claims for assault, battery and medical negligence and a claim that unknown defendants destroyed videotape evidence of the prison officers' use of excessive physical force against him.

Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment. Because plaintiff is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915(e)(2). In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

After reviewing the complaint, I conclude that plaintiff may proceed on his claims that defendants Grondin, Hunt, Koeller, Taylor and Murray used excessive force against him in violation of the Eighth Amendment and that defendant Waterman was deliberately indifferent to his medical needs. I will stay a decision on whether plaintiff may proceed on his state law claims because he has failed to allege that his notice of claim against the government defendants has been disallowed; plaintiff will have an opportunity to supplement his complaint to provide this information. Plaintiff may not proceed on his claim that defendants Huibregtse and Raemisch maintain a prison policy that permits the use of excessive physical force against inmates because his complaint contains no facts to

support that claim. This violates Fed. R. Civ. P. 8. However, plaintiff will be allowed to provide additional information in his supplement about the involvement of these government defendants in the alleged assault. Finally, plaintiff may not proceed on his claim that "unknown defendants" destroyed evidence that could be used to prove his case. The destruction or "spoliation" of evidence is not a claim on which relief may be granted at this stage in the case; it is an evidentiary matter that may be raised later in the lawsuit.

In his complaint, plaintiff alleges the following facts.

## ALLEGATIONS OF FACT

Plaintiff is a state prisoner housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendants Hunt, Koeller, Taylor and Murray are correctional officers at the facility. Defendant Grondin is the security supervisor and defendant Waterman is a nurse at the facility. Defendant Huibregtse is the facility's warden. Defendant Raemisch is Secretary of the Wisconsin Department of Corrections.

On July 29, 2005, defendants Hunt, Koeller and Taylor approached plaintiff's cell to conduct a random cell search. Plaintiff protested the search because his cell had been searched five days earlier. Defendant Grondin was brought to plaintiff's cell to listen to his complaint. Plaintiff agreed to be removed from his cell so that it could be searched. Defendants Hunt, Koeller and Taylor handcuffed and escorted plaintiff to the unit strip cell.

In the strip cell, defendants Hunt, Koeller and Taylor refused to uncuff plaintiff's left hand because he failed to obey orders. Defendant Grondin ordered defendants Hunt, Koeller and Taylor to take action against plaintiff. Defendants Hunt, Koeller and Taylor yanked plaintiff's left arm violently and began bending and twisting his arm. Defendants continued to do this until plaintiff screamed that his arm was going to break. Defendants' actions left a gash in plaintiff's left arm that was more than six inches long. Defendant Murray arrived at the scene as plaintiff was being escorted back to his cell. Plaintiff asked to see a nurse, and defendant Waterman was called. She saw plaintiff's injury and requested that he be brought to the health services unit, but defendants refused to do so, instead ordering defendant Waterman to examine plaintiff after he was escorted back to his cell.

Once at his cell, plaintiff noticed that his artwork and calendar had been removed. When plaintiff asked defendant Grondin why his items had been removed, defendant Hunt asked plaintiff to face forward. When plaintiff refused, defendant Hunt grabbed plaintiff's head and knocked it into a steel doorframe. Plaintiff was punched in the face, causing his glasses to fall to the ground. Defendant Grondin kicked plaintiff in the side and defendant Murray scratched and pinched his left leg. Defendant Taylor dragged him by his handcuffs as defendants Hunt and Koeller bent his wrists. Defendants told plaintiff that he was going to be taken to a segregation unit. When plaintiff asked defendants to give him his glasses before taking him to the segregation unit, defendants pushed plaintiff into a concrete wall

in the hallway.

After plaintiff was taken to the segregation unit, defendant Waterman, a facility nurse, came to clean the wounds on plaintiff's arm and leg. Later, plaintiff developed a severe headache and noticed a large bump on his head. He asked to be seen by a nurse. Defendant Waterman arrived, and plaintiff requested an ice pack and head examination. Defendant Waterman refused plaintiff's requests for medical care.

Plaintiff woke the next day in severe pain. He had bruises on his body and his hands, wrists and left arm were badly swollen. Plaintiff requested that pictures be taken of his injury, but the security office would not photograph the injuries. Plaintiff complained to defendants Huibregtse and Raemisch, but they failed to act on his behalf. Plaintiff also requested video tapes of the hallway of the cells, but facility staff refused to show plaintiff any videotapes.

## DISCUSSION

### A. Eighth Amendment Excessive Force Claim

The Eighth Amendment prohibits "unnecessary and wanton infliction of pain," which includes pain that is inflicted "totally without penological justification." Hope v. Pelzer, 536 U.S. 730, 737 (2001) (internal citations omitted). When a prison official stands accused of using excessive physical force in violation of the Eighth Amendment, the inquiry is

whether force was applied in a "good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. MicMillian, 503 US. 1, 6-7 (1992). Factors relevant to this determination include the need for an application of force, the relationship between the need and the force applied, the threat reasonably perceived by the responsible officers, the efforts made to temper the severity of the force employed and the extent of the injuries to the prisoner. Id.; DeWalt v. Carter, 224 F. 3d 607, 619-20 (7th Cir. 1999).

Here, plaintiff contends that defendants Grondin, Hunt, Taylor, Murray and Koeller used an excessive amount of physical force against him when he failed to obey orders and afterwards, all for for no discernible reason. Plaintiff alleges that defendants yanked, pushed, pinched, hit and kicked him until he sustained arm, leg and head injuries. The facts alleged do not suggest that plaintiff posed a serious risk of danger to the officers when they injured him or that defendants tempered the severity of the force employed. The allegations suggest that defendants acted maliciously and sadistically to cause harm, not merely to restrain petitioner or to restore order and that the amount of force used was far greater than the amount of force needed under the circumstances. Thus, plaintiff may proceed on his claim that these defendants used excessive physical force in violation of the Eighth Amendment.

B. Eighth Amendment Deliberate Indifference Claim

Plaintiff contends that defendant Waterman, a prison nurse, was deliberately indifferent to his medical needs in violation of the Eighth Amendment. Prison officials have a duty under the Eighth Amendment to provide medical care to those being punished by incarceration. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Estelle, 429 U.S. at 104; Guttierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A medical need may be serious if it is life-threatening, carries risk of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Guttierrez, 111 F.3d at 1371-73, "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994).

"Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendant know that plaintiff needed treatment?

(3) Despite defendant's awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

Plaintiff alleges that defendant Waterman cleaned the wounds on his left arm and leg but refused to examine his head adequately. Plaintiff alleges there was a large lump on his head the size of an egg and that he was suffering from severe head pain. At this stage, I can assume that an egg-sized lump on the head and severe head pain qualify as serious medical needs. I can infer that defendant Waterman knew plaintiff needed treatment when he complained of a headache and head injury. Although it is not clear from the alleged facts whether defendant Waterman evaluated his head injury at some point following the incident, I will assume that defendant Waterman refused to take reasonable measures to provide treatment. Thus, plaintiff may proceed with his deliberate indifference claim to the extent he asserts that defendant Waterman failed to provide medical treatment upon becoming aware of plaintiff's head injury. Later in this lawsuit, plaintiff will have to submit evidence showing that he suffered from a serious medical need of which defendant Waterman was aware but refused to provide necessary treatment.

C. State Law Claims

Plaintiff seeks to proceed on state law claims of assault, battery and medical negligence against defendants. When an individual intends to sue a government official acting in his official capacity, Wisconsin law requires the individual to file a notice of claim against the official. The individual cannot bring suit until the claim has been disallowed or rejected. Ibrahim v. Samore, 118 Wis. 2d 720, 726, 348 N.W.2d 554, 558 (1984) ("The notice of injury statute 'is not a statute of limitation but imposes a condition precedent to the right to maintain an action.'"). Wis. Stat. § 893.82(3m) states:

> If the claimant is a prisoner, as defined in s. 801.02(7)(a)2., the prisoner may not commence the civil action or proceeding until the attorney general denies the claim or until 120 days after the written notice under sub. (3) is served upon the attorney general, whichever is earlier.

In his complaint, plaintiff alleges that he has filed a notice of claim with the attorney general's office but does not say when he filed the claim or whether the claim has been disallowed. Because this is a threshold requirement for filing a state law claim against defendants, I will stay a decision on whether to grant plaintiff leave to proceed on his state law claims of assault, battery and medical negligence to give plaintiff an opportunity to supplement his complaint with information on when he filed the claim and whether the claim has been disallowed. If plaintiff fails to supplement his complaint, I will deny plaintiff leave to proceed on his state law claims and those claims will be dismissed.

D. Claim against Defendants Raemisch and Huibregtse

Plaintiff alleges that defendants Raemisch and Huibregtse maintain a policy, practice and custom that permits prisoners to be physically assaulted in violation of the Eighth Amendment. However, actions under 42 U.S.C. § 1983 cannot be brought against individuals for their supervisory role over others; to create a viable claim, the individual must have personal involvement in the constitutional violation. T.E. v. Grindle, 599 F.3d 583, 590 (7th Cir. 2010) ("Because there is no theory of respondeat superior for constitutional torts, a plaintiff 'must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution'") (quoting Ashcroft v. Iqbal, 129 U.S. 1937, 1948 (2009)). In his complaint, plaintiff includes this conclusory statement:

> The DOC has a policy, practice, custom and rule under direction of defendants Raemisch and Huibregtse that permits their staff to physically assault prisoners for disobeying orders or violating department rules, as done to Bracey above, and that policy, practice, custom, and rule remains in place today, which has resulted in the physical assault of many prisoners.

However, such conclusory statements in a complaint are to be disregarded. Iqbal, 129 U.S. at 1949. Plaintiff fails to allege any facts that might tend to show that defendants Raemisch and Huibregtse maintain a prison policy in which prison officials are permitted to use excessive physical force against inmates when they refuse orders. Thus, plaintiff has not pleaded enough facts to give defendants notice of his claims against them. This violates Fed. R. Civ. P. 8, which requires that a complaint include "a short and plain statement of the

claim showing that the pleader is entitled to relief." Because plaintiff has failed to present facts that defendants Raemisch and Huibregtse had personal involvement in the constitutional violation, I will dismiss these claims without prejudice. Plaintiff may have until July 22, 2010, to supplement his complaint with additional facts regarding this claim. In his supplement, plaintiff should provide specific information about the personal involvement of defendants Raemisch and Huibregtse in the alleged constitutional violation. Once I receive the supplement, I will screen plaintiff's claim against defendants Raemisch and Huibregtse.

E. Destruction of Evidence

Finally, plaintiff alleges that unknown defendants have destroyed videotape evidence of the prison officers' use of excessive physical force against him. In making this allegation, plaintiff may be trying to assert one of two claims, both of which fail. First, plaintiff may be arguing that the destruction of evidence has denied him meaningful access to the courts. However, if an individual has first-hand knowledge of the facts and circumstances surrounding the incident, the individual has not been denied meaningful access to the courts, even when a defendant conceals evidence. Thompson v. Boggs, 33 F.3d 847, 852-53 (7th Cir. 1994). Plaintiff can bring this lawsuit without corroborating videotape evidence because he has first-hand knowledge of the actions the prison officers took against him.

Plaintiff may also be arguing that there has been spoliation of evidence. Spoliation of evidence is an evidentiary matter, which would arise later in the lawsuit. Very few jurisdictions recognize destruction or "spoliation" of evidence as an independent tort, and Wisconsin is not one of them. E.g., J.S. Sweet Co., Inc. v. Sika Chemical Corp., 400 F.3d 1028, 1032 (7th Cir. 2005); Neumann v. Neumann, 2001 WI App 61 ¶ 80, 242 Wis. 2d 205, 626 N.W. 2d 821. Sanctions may be imposed for the spoliation of evidence if justified under the circumstances. However, as an evidentiary matter, a sanction may not be imposed unless there is someone to sanction; plaintiff has not identified a party who is responsible for the destruction of potential videotape evidence.

## CONCLUSION

To summarize, plaintiff may proceed against defendants Grondin, Hunt, Taylor, Murray and Koeller on his Eighth Amendment excessive force claim and he may proceed on his Eighth Amendment deliberate indifference claim against defendant Waterman.

To proceed on his state law claims and Eighth Amendment claim against defendants Raemisch and Huibregtse, plaintiff must provide a supplement to his complaint by July 22, 2010. In his supplement, plaintiff must state when he filed his claim of notice with the attorney general's office and whether that claim has been disallowed. Plaintiff must also include in his supplement specific facts about the personal involvement of defendants

Raemisch and Huibregtse in the alleged constitutional violations. Plaintiff should not include information about any other claims in his supplement.

Upon receiving plaintiff's supplement, I will screen plaintiff's state law claims and Eighth Amendment claim against defendants Raemisch and Huibregtse to determine whether plaintiff may proceed on these claims. I will then arrange for service of the complaint and supplement on the defendants who remain in the case. If plaintiff fails to file a supplement to his complaint by July 22, 2010, I will dismiss plaintiff's state law claims, and this case will proceed on plaintiff's Eighth Amendment claims against defendants Grondin, Hunt, Taylor, Murray, Koeller and Waterman.

ORDER

IT IS ORDERED that

1. Plaintiff Larry Bracey is GRANTED leave to proceed on the following claims:

(a) Defendants Grondin, Hunt, Taylor, Murray and Koeller violated his Eighth Amendment rights by using excessive physical force against him.

(b) Defendant Waterman violated his Eighth Amendment right by demonstrating deliberate indifference to his requests for medical care.

2. A decision on plaintiff's request for leave to proceed on his state law claims against defendants Grondin, Hunt, Taylor, Murray, Koeller and Waterman is STAYED. Plaintiff

may have until July 22, 2010, in which to supplement his complaint with information about the status of his notice of claim. If plaintiff does not submit a supplement to his complaint on or before that date, his state law claims will be dismissed.

3. Plaintiff's claim that defendants Huibregtse and Raemisch maintain a policy which permits inmates to be physically assaulted in violation of the Eighth Amendment is DISMISSED without prejudice because it violates Fed. R. Civ. P. 8. Plaintiff may have until July 22, 2010, in which to submit a supplement to his complaint that complies with this rule.

4. Service of the complaint on defendants is STAYED pending receipt and screening of plaintiff's supplement to the complaint.

5. Petitioner is DENIED leave to proceed on his claims regarding the destruction of potential videotape evidence. This claim is DISMISSED.

Entered this 8th day of July, 2010.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge