

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LARRY BRACEY,

Plaintiff,

v.

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

Defendants.

ORDER

10-cv-287-bbc

This is a civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. On July 8, 2010, I granted plaintiff Larry Bracey leave to proceed on his claims that defendants James Grondin, C.O. Hunt, Thomas Taylor, C.O. Murray and C.O. Koeller violated his right under the Eighth Amendment to be free from excessive force. I also granted plaintiff leave to proceed on his claim that defendant Waterman acted with deliberate indifference to his medical condition when she failed to examine his head injuries. I dismissed plaintiff's claim that defendants Raemisch and Huibregtse maintain a policy that permits and encourages prison officials to use excessive physical force against inmates,

because this claim violated Fed. R. Civ. P. 8. Finally, I stayed a decision on plaintiff's request for leave to proceed on his state law claims for assault and battery and medical negligence because it was unclear whether plaintiff had complied with the notice of claim requirements in Wis. Stat. § 893.82. I gave plaintiff an opportunity to supplement his complaint, providing more information about his claims against Raemisch and Huibregtse and the status of his notice of claim.

Plaintiff has filed a supplement to his complaint, dkt. #7, stating that he filed a notice of claim and injury with the Wisconsin attorney general's office more than 120 days before filing this complaint. Thus, it appears that plaintiff has satisfied the requirements of Wis. Stat. § 893.82. Plaintiff has also attempted to clarify his claim against Raemisch and Huibregtse. Plaintiff's state law claims and his claim against Raemisch and Huibregtse may now be screened under 28 U.S.C. § 1915(e)(2).

Under the 1996 Prison Litigation Reform Act, I am required to 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 and supplement, I conclude that plaintiff may proceed with a claim for the tort of assault and battery against defendants Grondin, Hunt, Koeller,

Taylor and Murray. In addition, plaintiff has stated a claim for medical negligence against defendant Waterman. However, plaintiff has failed to state a claim against defendants Raemisch and Huibregtse for violation of his rights under the Eighth Amendment. Therefore, Raemisch and Huibregtse will be dismissed from the case.

In his complaint and supplement, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff is a state prisoner housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendants C.O. Hunt, C.O. Koeller, Thomas Taylor and C.O. Murray are correctional officers at the facility. Defendant James Grondin is the security supervisor and defendant Jolinda Waterman is a nurse at the facility. Defendant Peter Huibregtse is the facility's warden. Defendant Rick 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. 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. Grondin ordered Hunt, Koeller and Taylor to take action against plaintiff. 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 bring him, instead ordering 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, 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. Grondin kicked plaintiff in the side and defendant Murray scratched and pinched his left leg. Defendant Taylor dragged him by his handcuffs as 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 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. Waterman arrived, and plaintiff requested an ice pack and head examination. Waterman refused plaintiff's requests for medical care.

DISCUSSION

A. Assault and Battery

Plaintiff has been granted leave to proceed on his claims that defendants Grondin, Hunt, Taylor, Murray and Koeller used an excessive amount of physical force against him in violation of the Eighth Amendment. Plaintiff contends that these defendants' actions also constitute the state tort of "assault and battery."

Federal courts may exercise supplemental jurisdiction over a state law claim that is "so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Plaintiff's assault and battery claim is part of the same case or controversy as his federal claim for excessive force.

Under Wisconsin law, "assault and battery" is a common law tort that has been defined as the "unlawful and intentional subjection of another to an offensive bodily contact." WIS JI-CIVIL 2010; McCluskey v. Steinhorst, 45 Wis. 2d 350, 357, 173 N.W.2d

148, 152 (1970). In addition, an assault and battery requires “an infliction of force” that is applied “in anger, for revenge, or in a rude or insolent manner.” WIS JI-CIVIL 2010; Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 338, n. 13, 565 N.W.2d 94, 104 (1997).

Plaintiff alleges that defendants yanked, pushed, pinched, hit and kicked him until he sustained arm, leg and head injuries. Plaintiff’s allegations suggest that defendants acted with anger and malice toward plaintiff. Thus, plaintiff has stated a claim that defendants intentionally subjected him to offensive bodily contact. He may proceed on his assault and battery claim against them.

B. Medical Negligence

Plaintiff has been granted leave to proceed on his claim that defendant Waterman, a prison nurse, exhibited deliberate indifference to his medical needs in violation of the Eighth Amendment when she allegedly refused to provide treatment for his head injury. Plaintiff contends that these facts also give rise to a claim for medical negligence under Wisconsin law. Plaintiff’s medical malpractice claim against defendant Waterman is part of the same case or controversy as his federal claim.

To prevail ultimately on a claim for medical malpractice in Wisconsin, plaintiff must prove that Waterman breached her duty of care and plaintiff suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. Plaintiff

alleges that defendant Waterman failed to provide treatment for his serious head injury. At this stage, it is possible to infer that defendant's failure may have been negligent. Therefore, plaintiff may proceed on his state medical negligence claim.

C. 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. I dismissed this complaint previously because plaintiff had failed to allege any facts tending to show that Raemisch and Huibregtse maintain such a policy or that such a policy contributed to a violation of plaintiff's constitutional rights. In plaintiff's supplement, he points to Wis. Admin. Code. § DOC 306.07, as the unconstitutional policy maintained by Raemisch and Huibregtse. This code provision, entitled "Use of force," provides, in relevant part:

- (2) Staff may use non-deadly force against inmates only if the user of force reasonably believes it is immediately necessary to realize one of the following purposes:
 - (a) To prevent death or bodily injury to oneself or another.
 - (b) To regain control of an institution or part of an institution.
 - (c) To prevent escape or apprehend an escapee.
 - (d) To change the location of an inmate.
 - (e) To control a disruptive inmate.
 - (f) To prevent unlawful damage to property.
 - (g) To enforce a departmental rule, a policy or procedure or an order of a staff member.

Wis. Admin. Code. § 306.07(2). Plaintiff contends that this policy, which was established allegedly by Huibregtse and is enforced by Raemisch, condones the use of unconstitutional excessive force against inmates.

However, defendants Huibregtse and Raemisch cannot be held liable for violating plaintiff's rights under Eighth Amendment solely because of the existence of this administrative regulation. First, plaintiff still fails to connect any specific, individual actions of Huibregtse and Raemisch to the harm he allegedly suffered. 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)). Moreover, the use of force against an inmate is not unconstitutional unless it is applied "maliciously and sadistically to cause harm" and not in a "good-faith effort to maintain or restore discipline." Whitley v. Albers, 475 U.S. 312, 320 (1986); Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). Section 306.07(2) of the Department of Corrections' regulations authorizes the use of force only under specific circumstances that would qualify as efforts "to maintain or restore discipline," and does not explicitly condone use of force applied maliciously or sadistically.

In sum, plaintiff has failed to state a claim under the Eighth Amendment against defendants Huibregtse and Raemisch for violating his right to be free of excessive force.

Thus, these defendants will be dismissed from the case.

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 used excessive force in violation of plaintiff's rights under the Eighth Amendment and committed the tort of assault and battery when they used physical force against him while conducting a cell search and transporting him to segregation.

(b) Defendant Waterman was deliberately indifferent to plaintiff's serious medical needs in violation of the Eighth Amendment and committed medical negligence under Wisconsin law when she refused to treat plaintiff's head injuries.

2. Plaintiff is DENIED leave to proceed on his claim that defendants Huibregtse and Raemisch maintain a policy that permits inmates to be physically assaulted in violation of the Eighth Amendment. This claim is DISMISSED for failure to state a claim upon which relief may be granted. The complaint is DISMISSED as to defendants Huibregtse and Raemisch.

3. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint, supplement to his complaint, the

July 8, 2010 order, dkt. #6, and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint for the defendants on whose behalf it accepts service.

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

5. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the officials at the Wisconsin Secure Program Facility of that institution's obligation to deduct payments until the filing fee has been paid in full.

7. Because I have dismissed claims asserted in 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 12th day of August, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge