IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JAMES R. SCHULTZ,

OPINION and ORDER

Plaintiff,

10-cv-581-bbc

v.

ERIC JOHNSON, JOHN SEVERSON,
KENNETH MILBECK and BRADLEY HOOVER,

Defendants.

- -

Pro se plaintiff James R. Schultz is proceeding on two claims relating to treatment he allegedly received from prison officials at Stanley Correctional Institution: (1) defendants Eric Johnson and John Severson used excessive force against him, in violation of the Eighth Amendment; and (2) defendant Kenneth Milbeck and Bradley Hoover disciplined him because of his involvement with Piety Global International, Inc. and because he possessed information critical of prison officials. Defendants' motion for summary judgment on these two claims is now before the court. (I previously dismissed other claims on the ground that plaintiff failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Dkt. #40. I have disregarded any arguments plaintiff made about those claims in his

summary judgment materials.)

Having reviewed the parties' submissions, I conclude that defendants are entitled to summary judgment on all of plaintiff's claims, with the exception of his claim that defendants Milbeck and Hoover disciplined him for referring to himself as a "special agent" of Piety Global, in violation of the First Amendment. Although that is not identical to the claim on which I allowed plaintiff to proceed, I will consider it because plaintiff included it in his complaint and defendants do not object to the claim now. However, I cannot grant defendant's motion for summary judgment as to this claim because neither side evaluated the claim under the appropriate legal standard. Accordingly, I will give both sides an opportunity to do so.

OPINION

A. Excessive Force

On March 17, 2005, defendants John Severson and Eric Johnson (correctional officers at the Stanley prison) escorted plaintiff to the hospital for back surgery. Plaintiff alleges that one or both of these defendants assaulted him at the hospital.

Both defendants deny in their affidavits that they assaulted plaintiff or otherwise used excessive force against him. Johnson Aff. ¶¶ 10-15, dkt. #81; Severson Aff. ¶¶ 10-15, dkt. #83. Plaintiff challenges these affidavits on the ground that they are "self serving," but this

is not a ground for excluding them. Berry v. Chicago Transit Authority, 618 F.3d 688, 691 (7th Cir. 2010) (citations omitted). Because defendants' affidavits rely on their own personal knowledge, they are admissible.

In any event, it is not defendants' burden to disprove plaintiff's claim. Even if I disregarded defendants' affidavits, plaintiff would still need to come forward with his own evidence showing that a reasonable jury could find in his favor. Marion v. Radtke, 641 F.3d 874, 876 -77 (7th Cir. 2011) ("When a plaintiff fails to produce evidence, the defendant is entitled to judgment; a defendant moving for summary judgment need not produce evidence of its own."). He has failed to do this.

Plaintiff does not aver in a sworn affidavit that he witnessed defendants or anyone else assault him. Rather, he relies on the following documents to infer that they assaulted him while he was unconscious:

- photos that show a large bruise on the left side of his lower back, dkt. #60;
- a report prepared by hospital staff after the surgery, which does not discuss any bruising, dkt. #101, exh A.
- allegations in his complaint that he was assaulted by Severson and Johnson and that plaintiff "was led to believe" by two unknown individuals that "the bruising could not have been caused by the

surgery," dkt. #6, at ¶¶ 17-18 and 21.

In addition, plaintiff says that defendants had multiple opportunities to assault him while he was unconscious.

None of this evidence would allow a reasonable jury to find that plaintiff was assaulted by defendants or anyone else. Although the pictures show a large bruise, they do not reveal how plaintiff received that bruise. In fact, plaintiff does not even say when he first noticed the bruise, whether he had it before the surgery or immediately after. (Plaintiff says the pictures were taken on March 23, 2005, six days after his surgery. Dkt. #60.) Even if I assume that plaintiff did not have the bruise before he had surgery, it is not necessarily surprising that plaintiff had a bruise on his back after having back surgery. The absence of any mention of the bruise in the hospital report does not help his case. To the extent it is surprising that hospital staff did not mention the bruise, this would be so regardless of the reason the bruise appeared. Arguably, it would be even more surprising if staff failed to mention a large bruise that the patient did not have when he arrived but developed mysteriously before he was discharged.

I cannot consider the alleged statements by others that the bruises "could not have been caused by the surgery." Plaintiff does not identify these individuals in his complaint or an affidavit, but in his briefs he says that they were nurses at the prison. Regardless, under the rule against hearsay, Fed. R. Evid. 802, a party may not rely on another person's

statements to prove the truth of a matter. (There are exceptions to this, Fed. R. Civ. P. 801 and 803, but none are applicable in this case.) The reason for the rule is straightforward: if a party could rely on another's statement to prove a fact, there would be no way for the other side to challenge the reliability of that statement. Anderson v. United States, 417 U.S. 211, 220 (1974) ("The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence.").

Even without the rule against hearsay, I could not consider the statements because they are simply conclusions without explanation. A court cannot accept a medical opinion or any expert opinion if the expert does not explain how she reached her conclusion. Zamecnik v. Indian Prairie School Dist. No. 204, 636 F.3d 874, 880-81 (7th Cir. 2011) ("Mere conclusions, without a hint of an inferential process, are useless to the court.") (internal citations omitted); Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir. 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.").

Plaintiff complains that he did not have an adequate opportunity to identify the nurses and contact them to act as potential witnesses for him. However, the court has explained to plaintiff twice that he waited too long to seek discovery regarding the contact information of the nurses. Dkt. ##98 and 105. In any event, even if plaintiff could obtain

admissible expert testimony that his bruise was *not* caused by his surgery and that it *was* the result of an assault, this would not be sufficient without additional evidence to allow a reasonable jury to draw the inference that *defendants* were responsible for assaulting plaintiff;

The allegations in plaintiff's complaint that he was assaulted by defendants Johnson and Severson are not admissible. I may treat his complaint as an affidavit because he swore to the allegations under penalty of perjury, Ford v. Wilson, 90 F.3d 245, 246-47 (7th Cir. 1996), but the allegations are inadmissible because they are conclusory and fail to establish any foundation for plaintiff's belief that defendants assaulted him. Luster v. Illinois Dept. of Corrections, 652 F.3d 726, 731, 652 F.3d 726 (7th Cir. 2011); Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 740 (7th Cir. 2006) ("[I]t is . . . axiomatic that a plaintiff's conclusory statements do not create an issue of fact."). If plaintiff was unconscious during the relevant time, he would have no personal knowledge of what happened to him.

Plaintiff's observation that Johnson and Everson had multiple "opportunities" to assault him adds nothing. An opportunity is not evidence. Plaintiff's belief that defendants assaulted him simply because they were present when he was unconscious is nothing more than speculation, which cannot overcome a motion for summary judgment. Ellis v. United Parcel Service, Inc., 523 F.3d 823, 827 (7th Cir. 2008))("[R]umor and conjecture are not enough to create a genuine issue of material fact."). Plaintiff does not identify any reason to believe that either Johnson or Everson even had a motive for trying to harm him, much

less a reason why hospital staff would remain silent if defendants had done so.

Defendants point out in their reply brief that plaintiff attached a letter to a motion he filed previously in this case in which he alleges that defendant Johnson "start[ed] to violently shake me" after he was anesthetized but before he fell unconscious. Dkt. #35-1, at 12. Although defendants' thoroughness is appreciated, plaintiff does not rely on this letter in his summary judgment materials or even cite it. Even if he had, the letter is not admissible because it is not sworn. Collins v. Seeman, 462 F.3d 757, 760 n.1 (7th Cir. 2006). Plaintiff cites no other evidence showing that he personally witnessed an assault by Johnson or Severson,

I agree with defendants that this case is similar to Trask-Morton v. Motel 6 Operating L.P., 534 F.3d 672, 678 (7th Cir. 2008), in which the court concluded that it was not reasonable to infer without specific evidence that the plaintiff had been assaulted while she was unconscious in her hotel room. As in that case, "a jury could not find that [plaintiff] was . . . assaulted . . . without resorting to impermissible speculation." Id. at 679. Accordingly, I am granting defendants' motion for summary judgment as to this claim.

B. Free Speech

I allowed plaintiff to proceed on claims that defendant Kenneth Milbeck and Bradley Hoover "punished him because of his involvement with Piety Global International, Inc. and

because he possessed information critical of prison officials." Dkt. #14, at 6. Plaintiff cites no evidence to support his allegation that he was punished in any way because of information he had. In fact, plaintiff does not identify what the information is and he scarcely mentions this issue in any of his summary judgment materials. Accordingly, plaintiff has failed to prove that claim.

With respect to plaintiff's claim about Piety International, it seems that I misconstrued it when screening the complaint. As it turns out, plaintiff was not disciplined simply for being a member of Piety International, but for identifying himself as a "Special Agent" of that organization in an outgoing letter to the Wisconsin Supreme Court. In particular, his conduct report shows that he was charged with violating Wis. Admin. Code. § DOC 303.31(1), which prohibits prisoners from using "[a] title for the inmate other than Mr., Ms., Miss, or Mrs., as appropriate." Dkt. #82-1. Defendant Hoover issued the conduct report and defendant Milbeck found plaintiff guilty and disciplined him with five days' loss of dayroom time.

When allowing plaintiff to proceed on this claim, I focused on his allegation in a supplement to his complaint that he received a conduct report "upon notification to defendants of my membership and association as special agent in Piety Global International, Inc." Dkt. #12, ¶ 38. Although that allegation is ambiguous, plaintiff also alleged in his amended complaint that defendants had disciplined him "for using his title as Special Agent

in Piety Global International, Inc." Dkt. #6, at ¶ 29. Accordingly, I conclude that plaintiff satisfied Fed. R. Civ. P. 8 with respect to this claim. Presumably, defendants agree because they do not seek dismissal of the claim on the ground that plaintiff changed the factual basis for it at summary judgment. Rather, defendants' sole argument is that plaintiff's discipline under § 303.31 is reasonably related to a legitimate penological interest.

That is the wrong standard. Although most claims brought by a prisoner are governed by the reasonable relationship test from Turner v. Safley, 482 U.S. 78 (1987), censorship of outgoing mail is one exception to that rule. In Procunier v. Martinez, 416 U.S. 396, 413–14 (1974), the Supreme Court held that prison officials must show that censorship of prisoner mail "further[s] an important or substantial government interest unrelated to the suppression of expression" and is "generally necessary" to protect that interest. Id. Although the Court has narrowed the reach of Procunier over the years, e.g., Thornburgh v. Abbott, 490 U.S. 401(1989) (declining to apply test to censorship of incoming publications), the Court has not overruled Procunier with respect to outgoing mail. In Thornburgh, 490 U.S. at 413, the Court explained that a different test may be appropriate because outgoing correspondence poses a less significant security threat to the prison than incoming mail or other matters that occur within the prison. To the extent the Supreme Court has left any doubt on the subject, it has been resolved by the court of appeals, which has stated that Procunier remains good law as it applies to outgoing mail. Koutnik v.

Brown, 456 F.3d 777, 784 n.1 (7th Cir. 2006).

Neither plaintiff nor defendants acknowledge that Procunier provides the governing standard in this case. The reason may be that, in the screening order, I assumed that the case was governed by Turner. However, at that time, I was not aware that plaintiff had been disciplined for the content of his outgoing mail. In light of the confusion over the appropriate standard, I think the fairest way to proceed at this point is to give both sides an opportunity to address plaintiff's censorship claim under Procunier. Defendants are on notice that if they fail to justify the discipline under the Procunier standard, I will enter judgment in plaintiff's favor. Ellis v. DHL Exp. Inc. (USA), 633 F.3d 522, 529 (7th Cir. 2011) ("District courts have the authority to enter summary judgment sua sponte as long as the losing party was on notice that it had to come forward with all its evidence.").

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Eric Johnson, John Severson, Kenneth Milbeck and Bradley Hoover, dkt. #77, is GRANTED as to plaintiff James Schultz's claim that defendants Johnson and Severson used excessive force against him and his claim that defendants Milbeck and Hoover retaliated against him for possessing information critical of the prison.

2. Plaintiff's complaint is DISMISSED as to defendants Johnson and Severson.

3. Defendants' motion is DENIED WITHOUT PREJUDICE with respect to plaintiff's claim that defendant Milbeck and Hoover violated plaintiff's First Amendment rights when they disciplined him for referring to himself as a "special agent" of Piety Global International, Inc.

3. Defendants may have until February 27, 2012 to file and serve a renewed motion, along with a supplemental brief and any additional evidence, to address the remaining claim under the standard in Procunier v. Martinez, 416 U.S. 396 (1974). Plaintiff may have until March 19, 2012, to file a response. No reply is necessary.

Entered this 30th day of January, 2012.

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