

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

MICHAEL B. KINGSLEY,

Plaintiff,

v.

DENNIS PEDERSEN, LISA JOSVAI,
PATRICIA FISH, ROBERT CONROY,
STAN HENDRICKSON, FRITZ DEGNER
and KARL BLANTON,

Defendants.

ORDER

10-cv-832-bbc

In this proposed civil action for monetary and injunctive relief, plaintiff Michael B. Kingsley contends that defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton used excessive force on him in violation of his rights under the Fourteenth Amendment and state law. Also, plaintiff contends that defendants Dennis Pedersen and Lisa Josvai exhibited deliberate indifference to his health and safety and defendants Josvai and Patricia Fish violated his right to procedural due process. 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 by the 1996 Prison Litigation Reform

Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. 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 claim that defendants Blanton, Conroy, Degner and Hendrickson committed the state tort of assault and battery and violated his rights under the Fourteenth Amendment by using excessive force against him. Also, plaintiff may proceed on his claim that defendants Fish and Josvai violated his right to procedural due process. However, plaintiff may not proceed on his claim that defendants Blanton, Conroy, Degner and Hendrickson violated Wis. Stat. § 940.29 or on his claim that defendants Pedersen and Josvai were deliberately indifferent to his safety.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Michael B. Kingsley is a prisoner at the Prairie du Chien Correctional Institution in Prairie du Chien, Wisconsin. During the events relevant to this case, he was a pretrial detainee at the Monroe County jail in Sparta, Wisconsin. Defendant Dennis Pedersen is the sheriff of Monroe County, defendant Lisa Josvai is the chief deputy at the

jail, defendant Robert Conroy is the lieutenant, defendants Stan Hendrickson and Patricia Fish are sergeants and defendants Karl Blanton and Fritz Degner are deputies.

On May 21, 2010, plaintiff was confined in a general population cell at the Monroe County jail. At about 5:30 a.m., defendant Hendrickson came to plaintiff's cell and woke him up, asking him if he wanted to take his medication. Plaintiff said he did not. Hendrickson told plaintiff to remove the paper that was covering the ceiling light, but plaintiff refused, telling Hendrickson that he did not put the paper on the light. Hendrickson left.

Shortly thereafter, defendant Conroy came to plaintiff's cell, woke plaintiff up and told him to take the paper off the light cover. When plaintiff refused, Conroy told him that he would face disciplinary action. A little while later, defendants Conroy, Hendrickson Blanton, and Degner came to plaintiff's cell, where plaintiff was lying face down on the cell bed. Degner pointed a stun gun at plaintiff's face and Hendrickson told plaintiff to get up and put his hands behind his back. Conroy told plaintiff that he was going to segregation for disobeying orders. Plaintiff said that he did not do anything wrong and that he did not want to get shot by the taser. He placed his hands behind his back and defendants Blanton, Degner and Hendrickson entered the cell. Blanton pinned plaintiff's feet to the cell bed and Hendrickson put his knee into plaintiff's back and placed handcuffs on that were extremely tight. Plaintiff was in serious pain.

Defendants Blanton and Hendrickson dragged plaintiff to the floor, causing plaintiff's feet to slam against the bed frame. Plaintiff fell to his knees and told defendants that his foot hurt. Defendants told plaintiff to get up and walk or they would drag him, but plaintiff could not walk. He complained repeatedly that his foot hurt. Blanton and Hendrickson dragged plaintiff through the cell block and then grabbed plaintiff's feet and carried him to segregation.

In segregation, defendants Blanton, Conroy, Degner and Hendrickson placed plaintiff face down on the bed. Blanton held plaintiff's feet to the cell bed and Hendrickson tightened his handcuffs to the point that they caused extreme pain and numbness to his hands. Then, Degner shot plaintiff with a taser. Defendants left plaintiff lying handcuffed in the segregation cell for about 30 to 45 minutes.

On May 22, 2010, defendant Fish gave plaintiff a major violation report charging him with failure to follow orders, resisting, disorderly conduct and causing jail disruption. Fish said she would be conducting the disciplinary hearing regarding the allegations and that based on the incident reports, she was going to give plaintiff a penalty of ten days in segregation. Fish asked plaintiff whether he wanted to have a hearing or whether he wanted to waive his hearing rights. Plaintiff told Fish that he did not understand his hearing rights and asked for a copy of the incident report. Fish told plaintiff she would provide him a copy after she finished editing it.

Later, plaintiff told defendant Fish that he wanted to have a disciplinary hearing. Fish told plaintiff that he had refused that right and would be penalized with ten days in segregation. Plaintiff said he wanted to appeal the decision.

On May 23, 2010, defendant Josvai came to plaintiff's cell to consider his appeal of defendant Fish's disciplinary decision. She told plaintiff that her job was to determine whether ten days of segregation was an appropriate penalty and said that if it had been her decision, she would have given plaintiff 40 days. Plaintiff told Josvai that he wanted a copy of the incident report and the opportunity to call witnesses regarding the allegations against him. Josvai upheld the ten-day penalty.

Plaintiff filed grievances with the jail and a notice of claim regarding these incidents. He has received no response to his grievances or notice of claim.

DISCUSSION

A. Excessive Force

Plaintiff contends that defendants Blanton, Conry, Degner and Hendrickson violated his constitutional rights by using excessive force on him when they entered his cell, restrained him and transported him to segregation. Because plaintiff was a pretrial detainee at the time of the incident, his excessive force claim falls under the Fourteenth Amendment's due process guarantee rather than the Eighth Amendment's protection from cruel and unusual

punishment. Forrest v. Prine, 620 F.3d 739, 743-44 (7th Cir. 2010). The Fourteenth Amendment provides at least as much protection as the Eighth Amendment standards and thus, it is appropriate to borrow the Eighth Amendment standard to determine whether a pretrial detainee has stated a claim of excessive force. Id.

To state a claim of excessive force against a prison official under the Eighth Amendment, a plaintiff must allege that the official applied force “maliciously and sadistically for the very purpose of causing harm,” rather than “in a good faith effort to maintain or restore discipline.” Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). The factors relevant to this determination include such matters as why force was needed, how much force was used, the extent of the injury inflicted, whether defendant perceived a threat to the safety of staff and prisoners and whether efforts were made to temper the severity of the force. Whitley, 475 U.S. at 321.

Plaintiff’s allegations about the force used against him by defendants Blanton, Conroy, Degner and Hendrickson do not suggest that he posed a serious risk of danger to defendants when they injured him or that defendants tempered the severity of the force employed. If plaintiff’s allegations are true, he may be able to prove that these defendants applied force for the sole purpose of harming him. Accordingly, I will allow plaintiff to proceed on his claim that defendants Blanton, Conroy, Degner and Hendrickson used excessive physical force in violation of the Eighth Amendment.

B. State Law Claims

Plaintiff contends that the actions of defendants Blanton, Conroy, Degner and Hendrickson constitute the state tort of “assault and battery.” Also, plaintiff contends that defendants violated Wis. Stat. § 940.29, “abuse of residents of penal facilities,” but this is a criminal statute that may not be enforced in the context of a civil action.

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 state law claims are 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; see also 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; see also Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 338 n.13, 565 N.W.2d 94, 104 (1997).

Plaintiff alleges that defendants Blanton, Conroy, Degner and Hendrickson caused him injury by restraining him, dragging him through a hall and shooting him with a taser.

Plaintiff's allegations suggest that defendants acted with anger and malice toward plaintiff. Thus, plaintiff has stated a claim that these defendants intentionally subjected him to offensive bodily contact. He may proceed on his assault and battery claim against them.

C. Failure of Defendants Pedersen and Josvai to Prevent Inmate Abuse

Plaintiff contends that defendants Pedersen and Josvai violated his rights under the Fourteenth Amendment by failing to protect him and other inmates from abuse by jail staff. The problem with this claim is that "individual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation.'" Minix v. Canarecci, 597 F.3d 824, 834 (7th Cir. 2010) (quoting Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003)). Plaintiff's allegations do not allow an inference that defendant Pedersen was even aware of the allegedly unconstitutional treatment that plaintiff received or that he encouraged or condoned it in any way. In addition, although defendant Josvai was involved in disciplining plaintiff, plaintiff has not alleged that she was involved directly in the alleged excessive force used against plaintiff or that she encouraged or condoned staff abuse of inmates. Without personal involvement in the allegedly unconstitutional treatment of plaintiff, defendants Pedersen and Josvai cannot be held liable by mere virtue of their supervisory status.

D. Due Process

Unlike a prisoner who has been convicted and sentenced, a pretrial detainee may not be punished for misconduct while in custody without due process. Bell v. Wolfish, 441 U.S. 520, 535 (1979); Holly v. Woolfolk, 415 F.3d 678, 679-80 (7th Cir. 2005) (“[A]lthough being placed in segregation is too trivial an incremental deprivation of a convicted prisoner’s liberty to trigger the duty of due process, . . . any nontrivial punishment of a person not yet convicted [is] a sufficient deprivation of liberty to entitle him to due process of law.”) (internal citations and quotations omitted). To state a right to due process, a pretrial detainee must allege either (1) an expressed intent to punish on the part of detention facility officials, or (2) that the challenged condition or restriction lacked a reasonable relationship to a legitimate, non-punitive administrative purpose. Bell, 441 U.S. at 538-39; Rapier v. Harris, 172 F.3d 999, 1005 (7th Cir. 1999).

Plaintiff alleges that he was provided no process before he was placed in disciplinary segregation on the basis of a false conduct report. These allegations permit an inference that plaintiff was placed in segregation as punishment, thus implicating his due process rights as a pretrial detainee. In addition, the allegations suggest that defendants Fish and Josvai were responsible for denying plaintiff process before he was punished. Therefore, plaintiff may proceed on his claim that defendants Fish and Josvai violated his right to procedural due process under the Fourteenth Amendment.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Kingsley is GRANTED leave to proceed on the following claims:

(a) Defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton violated his rights under the Fourteenth Amendment by using excessive force on him and committed the state tort of assault and battery;

(b) Defendants Josvai and Patricia Fish violated his right to procedural due process under Fourteenth Amendment.

2. Plaintiff is DENIED leave to proceed on the following claims:

(a) Defendants Dennis Pedersen and Lisa Josvai violated his rights under the Fourteenth Amendment by failing to protect him from serious harm caused by prison staff;

(b) Defendants Robert Conroy, Stan Hendrickson, Fritz Degner and Karl Blanton violated Wis. Stat. § 940.29.

3. The complaint is DISMISSED as to defendant Pedersen.

4. Copies of plaintiff's complaint and this order are being forwarded to the United States Marshall for service on defendants.

5. For the remainder of the 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.

6. 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.

7. 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 Prairie du Chien Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 31st day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge