IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PARISH GOLDEN,

Plaintiff,

OPINION and ORDER

v.

11-cv-616-bbc

WILLIAM POLLARD, MICHAEL BAENEN,
PETE ERICKSEN, LT. STUTLEEN,
CO II RAUSCH, CO II FRISCH,
CO II BIEMERET, CO II DEBROUX and
JOHN DOES 1-10,

Defendants.

- -

In this prisoner civil rights lawsuit brought under 42 U.S.C. § 1983, plaintiff Parish Golden is contending that correctional officers at the Green Bay Correctional Institution assaulted him without provocation, in violation of the Eighth Amendment, and then tried to prevent him from exhausting his administrative remedies, in violation of the First Amendment. The court has received plaintiff's initial partial payment of the filing fee, as required by 28 U.S.C. § 1915(b)(1), so the complaint is ready for screening under 28 U.S.C. §§ 1915(e)(2) and 1915A. Having reviewed the complaint I conclude that it states a claim

upon which relief may be granted under the Eighth Amendment with respect to several defendants, but the complaint must be dismissed as to other defendants because plaintiff does not allege that they were personally involved in the alleged constitutional violation. Plaintiff's claim under the First Amendment must be dismissed in its entirety.

OPINION

A. Eighth Amendment

Plaintiff's allegations that officers assaulted him are governed by the standard for excessive force set forth in Whitley v. Albers, 475 U.S. 312, 320 (1986), which is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." 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
- any efforts made to temper the severity of a forceful response

Id. at 321. In Hudson v. McMillan, 503 U.S. 1, 9-10 (1992), the Court refined this

standard, explaining that the extent of injury inflicted was one factor to be considered, but the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force.

In this case, plaintiff alleges that defendants Rausch, Frisch, Biemeret and DeBroux (all correctional officers) attacked him without provocation by shocking him with a taser, slamming him against the wall and "pushing and grabbing his hands" after he was handcuffed. He says that he suffered "extreme pain" and was left with bruises and a scar. Although it may be that plaintiff has not included all relevant facts in his complaint about the reasons for the use of the force, his allegations are sufficient to state a claim upon which relief may be granted.

With respect to defendant Stutleen, plaintiff alleges that he was the desk sergeant for the tier and failed to intervene to stop the assault. A public employee may be liable under § 1983 for failing to intervene to stop the constitutional violation committed by another employee. George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007); Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004); Windle v. City of Marion, 321 F.3d 658, 663 (7th Cir. 2003). This duty extends to supervisory and nonsupervisory officials alike, but it is limited to those situations in which the defendant has a reasonable opportunity to prevent the violation. Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994). At this stage of the proceedings, I will infer that Stutleen was aware of the attack and had a realistic opportunity

to intervene, but plaintiff will have to prove both facts at summary judgment or trial.

Plaintiff says that the warden (defendant William Pollard), the deputy warden (defendant Michael Baenen) and the security director (defendant Pete Ericksen) may be held liable because they failed to train, supervise and discipline the other defendants. However, supervisory officials may not be held liable under the Constitution for acts of negligence, United States v. Norwood, 602 F.3d 830, 835 (7th Cir. 2010), but only for what they actually knew. Luck v. Rovenstine, 168 F.3d 323, 327 (7th Cir. 1999). Similarly, a prison official may be held liable only if he caused the constitutional violation; plaintiff may not sue individuals for failing to correct a violation that has already occurred. George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007) (rejecting argument "that anyone who knows about a violation of the Constitution, and fails to cure it, has violated the Constitution himself"); Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) ("[T]he Constitution . . . does not require states to prosecute persons accused of wrongdoing."). Thus, plaintiff cannot sue the warden, deputy warden or security director for acting negligently or failing to discipline the other officers.

Although plaintiff says that the supervisory defendants acted with "deliberate indifference," that is simply a legal conclusion that I cannot accept as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). Plaintiff does not

include any allegations in his complaint showing that Pollard, Baenen or Ericksen knew that officers were likely to assault him, so I must dismiss the complaint as to plaintiff's Eighth Amendment against those three defendants.

Finally, plaintiff asserts an excessive force claim against two sets of "John Doe" defendants. First, plaintiff includes allegations about an unnamed officer who became "hostile" when plaintiff was complaining to the administrative captain about staff harassment. Plaintiff says "on information and belief" that the "hostile officer . . . had his fellow officers come attack me." Second, plaintiff says that another or different officer may have been involved in the use of force "because [prison] staff has a habit of wearing each other['s] name tags and identification badges to hide their true identity."

I am not allowing plaintiff to proceed against these unnamed defendants. Plaintiff includes no allegations showing that an unnamed officer directed others to assault plaintiff. Under Fed. R. Civ. P. 8, plaintiff must include enough allegations to state a claim that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Atkins v. City of Chicago, 631 F.3d 823, 830-32 (7th Cir. 2011) ("After Twombly and Iqbal a plaintiff to survive dismissal must plead some facts that suggest a right to relief that is beyond the speculative level.") (internal quotations omitted). Plaintiff concedes in his complaint that his theory about the unnamed officer is pure speculation. The same is true with respect to plaintiff's theory about false name badges. Further, plaintiff has not included enough

information about any of the unnamed officers to allow them to be identified by defendants at this time. If plaintiff learns in discovery that other officers were involved in the alleged excessive use of force, he may file a timely motion for leave to amend his complaint then.

B. First Amendment

Plaintiff's allegations about interference with his grievances do not state a claim under the Constitution. Prison officials may not retaliate against a prisoner for filing a grievance, DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000), but they are under no constitutional obligation to provide an effective grievance system or, for that matter, any grievance system at all. Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."); see also Grieveson v. Anderson, 538 F.3d 763, 772-73 (7th Cir. 2008); Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996). If prison officials prevented plaintiff from completing the grievance process, then defendants cannot prevail on a motion to dismiss the case for plaintiff's failure to exhaust his administrative remedies, Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006); Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002), but plaintiff does not have a separate claim for that conduct.

Even if I assumed that plaintiff could sue prison officials for interfering with his grievances as a violation of his right to send mail generally, he could not prevail because he does not identify any actions by particular defendants that violated his right. Instead, plaintiff simply alleges that "defendants" interfered with his mail without explaining what any individual defendant did. That is not sufficient. Again, if plaintiff learns in discovery that any defendant interfered with his mail, he may seek leave to amend his complaint. (If plaintiff discovers that officials other than defendants interfered with his mail, he will have to file a separate lawsuit, in accordance with Fed. R. Civ. P. 20.)

C. Motion for Appointment of Counsel

After plaintiff filed his complaint, he filed a motion for appointment of counsel. Before a district court can consider such motions, it must first find that the petitioner made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down. Plaintiff submitted letters addressed to three lawyers, but he has not submitted their responses.

Even if I assume that plaintiff's submissions satisfy Jackson, he has not shown that

appointment of counsel is necessary in this case. Ideally, every deserving litigant would be represented by counsel, but, unfortunately, the pro se litigants who file lawsuits in this district vastly outnumber the lawyers who are willing and able to provide representation. For this reason, appointment of counsel is appropriate only when the plaintiff demonstrates that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). In this case, it is too early to make that determination.

Thus far, plaintiff has not demonstrated any reason to believe that he cannot represent himself competently in this case. His complaint is relatively clear, well-organized and shows his familiarity with the legal concepts that are relevant to his case. Further, plaintiff's claim is a relatively simple one and the law on excessive force is well-established. Plaintiff's primary task will be to gather the facts necessary to prove his claim, many of which he should know personally. Finally, as a result of past cases plaintiff has litigated, I know that he is well-versed in the procedures of this court as well as the Federal Rules of Civil Procedure.

Plaintiff lists several reasons for his belief that counsel is necessary, but these apply to the majority of pro se litigants (limitations imposed by plaintiff's imprisonment, the existence of disputed facts) or are speculative at this stage in the case (inability to conduct adequate discovery, insufficient time in the law library). If later developments in the case show that plaintiff is unable to represent himself, he is free to renew his motion for appointment of counsel

at that time.

ORDER

IT IS ORDERED that

1. Plaintiff Parish Golden is GRANTED leave to proceed on his claims that defendants Rausch, Frisch, Biemeret and DeBroux used excessive force against him and that defendant Stutleen failed to intervene to help plaintiff, in violation of the Eighth Amendment.

2. Plaintiff is DENIED leave to proceed on his claims that (1) defendants William Pollard, Michael Baenen, Peter Ericksen and John Does 1-10 used excessive force against him, in violation of the Eighth Amendment; and (2) defendants interfered with his grievances, in violation of the First Amendment.

3. The complaint is DISMISSED as to defendants Pollard, Baenen, Ericksen and John Does 1-10.

4. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard

documents plaintiff submits that do not show 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 he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

6. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the 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 if it accepts service for defendants.

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). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 20th day of October, 2011.

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