

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

WILLIE SIMPSON,

Plaintiff,

v.

TIMOTHY HAINES,

Defendant.

OPINION and ORDER

11-cv-851-bbc

Plaintiff Willie Simpson is proceeding on Eighth Amendment claims challenging his conditions of confinement and defendant Warden Timothy Haines's failure to protect him, alleging that Haines was aware that correctional officers have been pumping "toxic chemicals" into his cell and did nothing to stop it. In a February 19, 2013 order, I denied plaintiff's motion for preliminary injunctive relief. Although the parties have completed the briefing of their cross-motions for summary judgment, plaintiff has filed a motion to voluntarily dismiss his Eighth Amendment claims and instead proceed on what he calls Fourteenth Amendment conditions of confinement claims. After considering the documents submitted by the parties, I will deny plaintiff's motion to dismiss his Eighth Amendment claims as well as his motion for summary judgment, and grant defendant's motion for summary judgment.

OPINION

Plaintiff asks to voluntarily dismiss his Eighth Amendment claims against defendant Haines and instead proceed on what he calls Fourteenth Amendment conditions of confinement claims. At this point in the proceedings, his claims may be dismissed only by the court or by a stipulation between the parties. Defendant does not stipulate to dismissal, and at this late date in the proceedings, particularly after the parties have adduced facts on their cross-motions for summary judgment, I do not consider it appropriate to grant plaintiff's request. Accordingly, I will deny his motion.

To the extent that plaintiff seeks to replace his Eighth Amendment claims with Fourteenth Amendment claims, he will not be allowed to do so, for several reasons. First, this case is more than 16 months old and plaintiff has already previously amended his complaint and filed motions for reconsideration of the court's screening orders. It is simply too late into the litigation (after both sides have moved for summary judgment) and unfair to defendant to change the nature of plaintiff's claims.

Second, even if plaintiff were proceeding on Fourteenth Amendment claims, I would have to grant summary judgment to defendant given the facts adduced by the parties on their cross-motions. Even assuming that plaintiff should establish a protected liberty interest, he does not provide any evidence suggesting that he was denied any process he was due. The closest plaintiff comes to this is the main thrust of his summary judgment materials: his contention that the office of the warden was "vacant" because defendant Haines did not properly follow the procedures for making his oath of office. Under Wis. Stat. § 302.03, defendant was required to "take the official oath" to support the United

States and Wisconsin constitutions and faithfully discharge the duties of his office. See also Wis. Stat. § 19.01 (describing oath of office). Under Wis. Stat. § 17.03, an office becomes vacant when a “person elected or appointed or reelected or reappointed to any office neglects or refuses to take and file the official oath or to execute or renew the official bond if required, or to file the oath or bond as prescribed by law.” Plaintiff argues that the office of the warden is vacant because Haines did not file his oath with the clerk of court for Grant County. However, defendant points out that under Wis. Stat. § 19.01(4)(a)(9), Haines is required to file his oath with the Wisconsin secretary of state, not with a county clerk of court. Thus, plaintiff has not provided any evidence suggesting that Haines has failed to follow the proper oath procedure.

Finally, whether I consider plaintiff’s claims under the Eighth or Fourteenth Amendments, he has not provided sufficient evidence of the conditions of his confinement to avoid a grant of summary judgment in defendant’s favor. Plaintiff is virtually silent regarding the actual conditions of his confinement, choosing instead to focus on defendant Haines’s oath. As I stated to plaintiff in the February 19, 2013 order, he “should be aware that he will not be able to succeed on his claims if he fails to provide proposed findings of fact detailing the circumstances behind each alleged use of chemical agents against him. He will also need to respond to the proposed findings of fact submitted by defendants.”

Because plaintiff has not provided facts about the conditions of confinement or particular acts about the use of chemical agents, defendant’s version is undisputed. The undisputed facts show that prison officials used pepper spray against plaintiff four times over the course of more than a year (July 30, 2011, August 14, 2011, November 20, 2012 and

September 13, 2012), each time as part of a cell extraction after plaintiff refused to comply with staff's directions for him to leave the cell. The use of chemical agents is not a per se violation of the Eighth Amendment; chemicals may be used in limited quantities when reasonably necessary to subdue or maintain control over an inmate. Soto v. Dickey, 744 F.2d 1260, 1270-71 (7th Cir.1984). The use of such an agent violates the Eighth Amendment only if it is used "in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain." Id. Plaintiff does not provide any evidence indicating that this was so or any evidence indicating that Haines personally approved those usages or was given any reason to think that prison officials were abusing the use of pepper spray.

Plaintiff argues that he was in danger because he was overseen by the same prison staff members whom he had been accused of battering in an earlier incident, but he does not describe any threats by prison officials tied to the criminal charges. In short, the facts in the summary judgment record are vastly different from the allegations in plaintiff's complaint that he was constantly being illicitly sprayed with "toxic chemicals" in retaliation for an earlier scuffle with prison officials. Because the undisputed facts do not indicate that defendant Haines violated plaintiff's constitutional rights under either the Eighth or Fourteenth amendments, I will deny plaintiff's motion for summary judgment, grant defendant's motion and direct the clerk of court to enter judgment for defendant.

Defendant has filed also a motion to strike plaintiff's response to defendant's proposed findings of fact concerning defendant's motion for summary judgment. I will deny that motion as moot.

ORDER

IT IS ORDERED that

(1) Plaintiff Willie Simpson's motion to voluntarily dismiss his Eighth Amendment claims, dkt. #93, is DENIED.

(2) Plaintiff's motion for summary judgment, dkt. #71, is DENIED.

(3) Defendant Timothy Haines's motion for summary judgment, dkt. #75, is GRANTED.

(4) Defendant's motion to strike plaintiff's response to defendant's proposed findings of fact concerning defendant's motion for summary judgment, dkt. #109, is DENIED as moot.

(5) The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 29th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge