

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

JEFFREY E. OLSEN,

Plaintiff,

v.

TIM DOUMA, JANEL NICKEL,
CAPTAIN DONALD MORGAN,
SERGEANT SCHNIEDER
and TENEBRUSCO,

Defendants.

ORDER

11-cv-282-slc¹

In this proposed civil action for monetary and injunctive relief, plaintiff Jeffrey Olsen contends that several defendants at the Columbia Correctional Institution in Portage, Wisconsin have violated his constitutional rights. He 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

¹ For the purpose of issuing this order, I am assuming jurisdiction over the case.

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 Donald Morgan and Sergeant Schnieder violated his rights under the Eighth Amendment by failing to protect him from a substantial threat of attack by another inmate. Also, plaintiff may proceed on his claim that Schnieder violated his rights under the First Amendment by filing conduct reports against plaintiff in retaliation for plaintiff's complaints about Schnieder's failure to protect him.

Plaintiff may not proceed on his claims against defendants Tim Douma, Janel Nickel or Tenebrusco because his complaint does not state a claim for any constitutional violation by these defendants. However, I will give plaintiff an opportunity to supplement his complaint with respect to his claim regarding denial of medical treatment.

Also before the court is plaintiff's motion for emergency injunction relief, dkt. #6, in which he seeks an injunction preventing defendant Janel Nickel from transferring him to the Wisconsin Secure Program Facility. Because plaintiff alleges no facts to suggest that injunctive relief is appropriate or necessary, I will deny the motion.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Attack by Another Inmate

At all times relevant to the complaint, plaintiff Jeffrey Olsen was incarcerated at the Columbia Correctional Institution, located in Portage, Wisconsin. Defendants are employed at the prison. Tim Douma is the acting warden, Janel Nickel is the security director, Captain Donald Morgan is manager of the segregation complex, Sergeant Schnieder is a supervisor in the segregation unit and Tenebrusco is the manager of the health services unit.

On March 21, 2011, another inmate, Thomas Russell, was placed in the same cell with plaintiff in the disciplinary segregation unit. Russell had mental health problems but refused to take his medication, causing him to hear voices and engage in violent outbursts and random attacks on other prisoners. Shortly after Russell was placed in plaintiff's cell, he "attacked" plaintiff. Plaintiff wrote to defendant Morgan about the attack but Morgan did not respond.

On March 26 or 27, Russell attacked plaintiff again. Plaintiff told defendant Morgan about the attack. He also told defendant Schnieder about the attack and told Schnieder that he was afraid Russell would hurt him. Neither Morgan nor Schnieder responded to plaintiff. On March 28, Russell attacked plaintiff a third time, causing extreme pain and injuries to plaintiff's arms and jaw and breaking at least one of plaintiff's teeth. Later that day, a nurse looked at plaintiff's injuries and stated that she believed his tooth needed to be pulled.

Plaintiff has filed numerous requests for medical treatment, but besides the initial examination by the nurse, he has received no medical or dental care or pain medication for the injuries resulting from the attack. His injuries cause him serious pain and he has been unable to eat.

Plaintiff filed a complaint about Russell's attack and Schnieder's failure to move Russell to a different cell. Schnieder denied that plaintiff ever told him about the previous attacks or that he was afraid of Russell. Defendants Morgan, Nickel and Douma believe Schnieder's version of events.

Plaintiff was issued conduct reports for lying about his conversations with Schnieder. He also received a conduct report for fighting.

B. Legal Loan

Plaintiff is indigent and receives one envelope and two pieces of paper each week. He has several ongoing legal actions in state courts and cannot afford to comply with all of the paper filing requirements. Plaintiff has requested a legal loan to purchase a pen, paper and postage, but his requests have been denied because he bought coffee in October 2010.

DISCUSSION

A. Eighth Amendment Failure to Protect

Under the Eighth Amendment, prison officials are required to “take reasonable measures to guarantee” the safety of their prisoners. Farmer v. Brennan, 511 U.S. 825, 832 (1994). A prison official may violate the Eighth Amendment if he acts with “deliberate indifference” to a prisoner’s exposure to a “substantial risk of serious harm.” Id. at 834. The Court of Appeals for the Seventh Circuit has held that a particularly violent prisoner’s unsupervised access to others may pose a substantial risk of serious harm. Brown v. Budz, 398 F.3d 904, 913 (7th Cir. 2005) (Caucasian inmate faced substantial risk when assailant with known propensity for attacking Caucasians had unsupervised access to shared space where inmate was lounging); see also Billman v. Indiana Dept. of Corrections, 56 F.3d 785, 788-89 (7th Cir. 1995) (HIV positive inmate with “propensity” for raping cellmates constituted a substantial risk to cellmates).

Plaintiff alleges that inmate Russell was prone to “violent outbursts and random attacks” and that Russell attacked him on multiple occasions while they were in the same cell. Also, plaintiff alleges that he complained to Morgan and Schnieder about Russell’s behavior and attacks and that they did nothing to protect plaintiff. As a result, plaintiff suffered serious injury at the hands of Russell. Plaintiff’s allegations are sufficient to infer that being housed with Russell posed a substantial risk of harm to plaintiff, and that defendants Morgan and Schnieder were aware but failed to take reasonable measures to abate it. Therefore, plaintiff may proceed on his Eighth Amendment failure to protect claim

against defendants Morgan and Schnieder.

B. Retaliation

“An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution.” DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). To state a claim for retaliation, plaintiff must: (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by defendant that would likely deter a person from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff’s protected activity was a motivating factor in defendant’s decision to take retaliatory action. Bridges v. Gilbert, 557 F.3d 541, 546 (7th Cir. 2009) (citing Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008)).

Plaintiff contends that defendant Schnieder retaliated against him for filing an inmate complaint against Schnieder for failing to protect him from inmate Thomas Russell. In the context of a retaliation claim, a prisoner’s right to file a grievance has been recognized as a constitutionally protected activity, Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005), so the only issue is whether defendant Schnieder took retaliatory action against plaintiff and whether he did so at least in part because plaintiff filed a grievance. Plaintiff alleges that after he filed a grievance regarding the attack by Russell, Schnieder lied about whether

plaintiff had talked to him about Russell and then filed a conduct report against plaintiff for lying and fighting. These allegations are sufficient to imply that plaintiff's grievance was a motivating factor in Schnieder's treatment of plaintiff and the issuance of the conduct reports. Additionally, it is plausible to infer that a person of ordinary firmness would be deterred from filing grievances in the future if it meant that he would receive conduct reports. Therefore, plaintiff may proceed with his retaliation claim against defendant Schnieder.

C. Eighth Amendment Failure to Provide Medical Care

Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v.

Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer, 511 U.S. at 847.

“Deliberate indifference” means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Plaintiff alleges that he suffered a serious injury to his arms, jaw and teeth that required medical treatment and that he has received no treatment. Plaintiff has pleaded enough facts to infer that his injuries qualify as a serious medical need. However, although plaintiff names defendant Tenebrusco, the manager of the health services unit, as a defendant, plaintiff alleges no facts from which it can be inferred that Tenebrusco knew about plaintiff’s injuries or acted with deliberate indifference to those injuries. Plaintiff’s complaint contains no allegations at all regarding Tenebrusco or any particular person who knew about plaintiff’s injuries but failed to provide him with medical care. It is well established that liability under § 1983 must be based on a defendant’s personal involvement in the constitutional violation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Additionally, a defendant cannot be held liable for a constitution violation on the basis of his supervisory status. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Thus, it is not enough to allege that Tenebresco is the manager of the health services unit.

Because plaintiff has failed to name any individual who was personally involved in denying him medical care, he may not proceed with his medical treatment claim at this time. However, I will give plaintiff an opportunity to supplement his complaint to provide more information about the individuals who knew of plaintiff's need for medical care but disregarded it.

D. Defendants Tim Douma and Janel Nickel

Plaintiff has named Tim Douma and Janel Nickel as defendants, but the only allegations related to them concern their rejection of plaintiff's inmate complaint regarding defendant Schnieder. Plaintiff does not allege that Douma or Nickel were ever aware that he was at risk of harm before he was attacked; and he does not allege that he is still at risk of harm and that Douma and Nickel could act to protect him. "Ruling against a prisoner on an administrative complaint does not cause or contribute to [a constitutional] violation." George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007). As the Court of Appeals has explained, "[a] guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not." Id. at 609-10. Because plaintiff does not allege that defendants Douma or Nickel caused, participated in or observed the violations of his Eighth or First Amendment rights, his complaint will be dismissed as to those defendants.

E. Access to the Courts

It is not clear from plaintiff's complaint whether he is seeking to bring a separate claim for denial of access to the courts for the prison's refusal to grant him legal loans necessary to prosecute his state court cases. Although he alleges that he has been denied legal loans and cannot afford paper, as evidenced by his using an inmate complaint form to file his § 1983 complaint, he lists no particular defendants responsible for the denial and alleges no facts suggesting that he has suffered prejudice in any of his ongoing court proceedings. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (claim for denial of access to courts requires plaintiff to show that he had non-frivolous underlying cause of action that has been lost or impeded). Thus, if he was intending to raise a claim for denial of access to the courts, his complaint does not contain enough facts to support such a claim.

F. Preliminary Injunction

About ten days after plaintiff filed this case, he filed a motion for a preliminary injunction, dkt. #6, contending that defendant Nickel is attempting to transfer him from the Columbia Correctional Institution to the Wisconsin Secure Program Facility. He filed a similar motion on May 13, 2011. Dkt. #7. He asks the court to prevent the transfer and

contends that Nickel is transferring him in retaliation for his lawsuit against her.

As an initial matter, because plaintiff will be denied leave to proceed against defendant Nickel on any claims in this lawsuit, she will be dismissed from the case. As a general rule, this court will not grant injunctive relief against a person who is not a party to the lawsuit. Thus, I would not grant injunctive relief against Nickel.

Additionally, plaintiff's motion for injunctive relief does not comply with this court's procedures for obtaining preliminary injunctive relief. Under these procedures, plaintiff must file with the court and serve on defendants proposed findings of fact supporting his claim, and submit with his proposed findings of fact any evidence he has to support his request for relief. Plaintiff has submitted no proposed findings of fact or evidence to support his motion. Finally, even if I were to consider the merits of plaintiff's motion at this time, I would deny the motion.

Granting preliminary injunctive relief is "is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 389 (7th Cir. 1984). A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: (1) whether the plaintiff has a reasonable likelihood of success on the merits; (2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (3) whether the threatened injury to the plaintiff outweighs the threatened

harm an injunction may inflict on defendant; and (4) whether the granting of a preliminary injunction will disserve the public interest. Pelfresne v. Village of Williams Bay, 865 F.2d 877, 882-83 (7th Cir. 1989).

At this stage, I am not persuaded that a injunctive relief is necessary or appropriate. Plaintiff has shown no likelihood of proving that the transfer is in retaliation for his filing this lawsuit because he has not alleged that defendant Nickel is even aware of the case. Also, plaintiff has alleged no facts suggesting that he will suffer irreparable harm if he is transferred to another prison. Accordingly, plaintiff's motion for injunctive relief will be denied.

G. Conclusion

At this time, plaintiff will be granted leave to proceed on his claims that defendants Morgan and Schnieder violated his rights under the Eighth Amendment by failing to protect him against the attack from inmate Russell and that defendant Schnieder retaliated against plaintiff by filing conduct reports against him. The remainder of plaintiff's claims will be dismissed. However, plaintiff may have until May 24, 2011 to file a supplement to his complaint regarding his medical care claim. In his supplement, plaintiff should identify the particular individuals who were aware of plaintiff's medical need and who failed to take reasonable steps to provide him with appropriate care. Plaintiff should not include information about any other claims in his supplement.

Upon receiving plaintiff's supplement, I will screen plaintiff's Eighth Amendment medical care claim to determine whether he may proceed on the claim against any defendant. I will then arrange for service of the complaint and supplement on the defendants who remain in the case. If plaintiff does not file a supplement to his complaint by May 24, 2011, the case will proceed on plaintiff's claims against defendants Morgan and Schnieder.

ORDER

IT IS ORDERED that

1. Plaintiff Jeffrey E. Olsen is GRANTED leave to proceed on the following claims:
 - a. defendants Donald Morgan and Sergeant Schnieder violated plaintiff's rights under the Eighth Amendment by failing to protect him from an attack by another inmate; and
 - b. defendant Schnieder violated plaintiff's rights under the First Amendment by filing conduct reports against plaintiff in retaliation for plaintiff's complaints about Schnieder's failure to protect him.
2. Plaintiff is DENIED leave to proceed on the following claims:
 - a. defendants Tim Douma and Janel Nickel violated his constitutional rights by rejecting his complaints related to the inmate attack;
 - b. defendant Tenebrusco violated his rights under the Eighth Amendment by failing to provide him medical treatment; and

c. prison staff violated plaintiff's right of access to the courts by denying him legal loans.

3. Plaintiff's complaint is DISMISSED as to defendants Douma, Nickel and Tenebrusco.

4. Plaintiff's motions for a preliminary injunction, dkt. #6 and dkt. #7, are DENIED.

5. Plaintiff may have until May 24, 2011 in which to supplement his complaint with information about his claim that he was denied medical treatment in violation of the Eighth Amendment.

6. Service of the complaint on defendants is STAYED pending receipt and screening of plaintiff's supplement to the complaint.

Entered this 18th day of May, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge