

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

DAVIN ROLLINS,

Plaintiff,

v.

DENNIS MCKNIGHT and MICHAEL LEEMAN,²

Defendants.

ORDER

12-cv-389-slc¹

In this proposed civil action for monetary relief, plaintiff Davin Rollins contends that defendants Dennis McKnight and Michael Leeman used excessive force against him in violation of his constitutional rights. 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 Prisoner Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief can 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

¹ For purposes of this order, I am assuming jurisdiction over this case.

² Plaintiff referred to defendants only as "McKnight" and "Leahman" in his complaint. The Incident Report submitted by plaintiff to the court includes the full and correct names of defendants, and I have amended the caption accordingly. Dkt. # 18, Ex. 1.

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 McKnight and Leeman violated his constitutional rights by using excessive force against him.

As a preliminary matter, I note that it is questionable whether venue is appropriate in this court. The events giving rise to plaintiff's claim occurred in Milwaukee, which is located in the Eastern District of Wisconsin. Consequently, venue in this court may not be proper. 28 U.S.C. 1391 ("A civil action may be brought in . . . a judicial district in which any defendant resides [or] . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . ."). However, venue is waivable. American Patriot Insurance Agency, Inc. v. Mutual Risk Management, Ltd., 364 F.3d 884, 887 (7th Cir. 2004). For this reason, I will not dismiss or transfer the suit at this stage.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Davin Rollins is a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin. During the events relevant to this case, he was being held at the Milwaukee County jail in Milwaukee, Wisconsin. Defendants Dennis McKnight and Michael Leeman are officers of the Milwaukee County Sheriff's Department.

In October 2009, defendants removed plaintiff from his cell to conduct a room search. Once plaintiff was removed from his cell, defendant McKnight smiled "harshly" at plaintiff and said, "This is our time to do what we said we were going to do." Cpt., dkt. #

5, at 3. Plaintiff feared for his safety, having previously had “an exchange of words” with defendant McKnight.

Plaintiff ran towards the exit door, hoping to attract the attention of nearby officers. Defendants pursued him and struck him in one eye and then the other with closed fists. Defendants then forced plaintiff to the ground and began kicking and beating the right side of his face. He lost consciousness.

When plaintiff awoke, he felt very weak. The nurses treated plaintiff’s mouth and face and a sergeant took pictures of his injuries before returning him to his cell. Defendant McKnight made threatening remarks to plaintiff after the incident, telling plaintiff that he should have killed him and that next time plaintiff would not be so lucky. Plaintiff feared for his life.

DISCUSSION

A. Excessive Force

Plaintiff contends that defendants McKnight and Leeman violated his constitutional rights by using excessive force on him when they struck him in the face twice with closed fists, forced him to the ground and beat him. It is unclear from the facts whether plaintiff was a pretrial detainee or a convicted prisoner during the time relevant to the case. The Eighth Amendment’s protection from cruel and unusual punishment applies to excessive force claims brought by prisoners, while excessive force claims brought by pretrial detainees fall under the Fourteenth Amendment’s due process guarantee. Forrest v. Prine, 620 F.3d

739, 743-44 (7th Cir. 2010). The Fourteenth Amendment provides at least as much protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment. Id. at 744.

Because plaintiff was being held at the Milwaukee County jail, it is likely that he was a pretrial detainee whose claim falls under the Fourteenth Amendment. However, even if I apply the arguably stricter Eighth Amendment standard, I would find that plaintiff has stated a claim of excessive force against defendants.

To state such a claim, a plaintiff must allege that the defendant 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 why force was needed, how much force was used, the extent of the injury inflicted, whether defendant reasonably 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 by defendants McKnight and Leeman suggest that defendants did not temper the severity of the force they applied and used more force than necessary. Plaintiff’s allegations suggest that once defendants had plaintiff stabilized on the ground, he posed no additional threat to the safety of staff and prisoners. If plaintiff can prove these allegations that defendants kicked and beat him after he was on the ground and stabilized and for the sole purpose of harming him, he would have a good

chance of prevailing in this suit. Plaintiff's allegations that defendant McKnight made threatening remarks both before and after the altercation suggest that defendants applied force maliciously and not in a good faith effort to maintain discipline. Accordingly, I will allow plaintiff to proceed on his claim that defendants McKnight and Leeman used excessive force in violation of plaintiff's constitutional rights.

B. Motion for Appointment of Counsel

Plaintiff has not filed a motion for appointment of counsel, but he has written several letters to the court expressing interest in doing so. Plaintiff should be aware that when deciding whether to appoint counsel, the court must first find that a plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. Jackson v. County of McLean, 953 F.2d 1070, 1073 (7th Cir. 1992). To prove that he has made a reasonable effort to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he has asked to represent him and who turned him down. Armstrong v. Wisconsin, 2012 WL 4467570, *4 (W.D. Wis. Sept. 26, 2012).

The court does not automatically grant a plaintiff's request for counsel when he makes a showing of reasonable effort. The court must consider a second question, "given the difficulty of the case, does the plaintiff appear competent to litigate it himself?" Pruitt v. Mote, 503 F.3d 647, 654 (7th Cir. 2007). The answer to this question involves an analysis of the difficulty of the case, both factual and legal, and an analysis of the plaintiff's

capacity to represent himself. Id. at 655. Plaintiff should address these matters if he chooses to file a motion for appointment of counsel.

ORDER

IT IS ORDERED that

1. Plaintiff Davin Rollins is GRANTED leave to proceed on his claim that defendants Dennis McKnight and Michael Leeman violated his constitutional rights by using excessive force against him.

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

3. 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.

4. 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.

5. 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 Waupun Correctional Institution of that institution's obligation to deduct payments until

the filing fee has been paid in full.

Entered this 11th day of October, 2012.

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