IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATANAEL RIVERA,

OPINION AND ORDER

Plaintiff,

12-cv-520–bbc

v.

CORRECTION OFFICER FRANCOIS,
MINNING, LINDMEIER, ROUSE,
PETERSON, COMMING, DR. BREEN,
RN TREMEL, JOHN DOE 1-20 and JANE DOE 1-20,

Defendants.

- -

Pro se plaintiff Natanael Rivera has filed a proposed complaint under 42 U.S.C. § 1983 regarding an incident that occurred on May 23, 2011 at the Green Bay Correctional Institution. In particular, he alleges that he was placed in restraints for more than 12 hours, in violation of the Eighth Amendment. Because plaintiff is a prisoner, I must screen his complaint and dismiss any claims that fail to state a claim upon which relief may be granted. 28 U.S.C. § 1915A. Having reviewed the complaint, I conclude that plaintiff may proceed with his claim against defendant Lindmeier and the John Doe defendants, but the remaining defendants will be dismissed because plaintiff does not allege that any of them were personally involved in the decision to restrain him.

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). Plaintiff fairly

alleges the following facts in his complaint.

ALLEGATIONS OF FACT

On May 23, 2011, at approximately 10:30 a.m. plaintiff Natanael Rivera was released from observation status at the Green Bay Correctional Institution. Although he asked staff for the return of "his property and segregation linen," seven hours later he had not yet received it. When he complained to defendant Minning, Minning stated, "I don't give a fuck what you want or need bitch." Defendant Francois came to plaintiff's cell and said, "You're giving me a headache. Stop banging or I will make you regret it." Defendant Lindmeier was called to the scene and told plaintiff he was being placed on control status "for repeatedly requesting his much needed property and linen by banging on his cell door." (Plaintiff does not allege affirmatively that he was banging on his cell door, but he does not deny that he was doing so.)

Plaintiff was transferred to another cell, where defendant Lindmeier ordered staff to place plaintiff in six-point restraints and to place "iron mechanical restraints" on plaintiff's ankles. Plaintiff asked defendant Breen from psychological services and defendant Tremel from health services to order "defendants" to remove the restraints from plaintiff's ankles, but Breen and Tremel ignored plaintiff's request. (Plaintiff does not explain how he was able to speak to Breen and Tremel, but it may be that they were sent to check on him because of the restraints.)

After 30 minutes in the restraints, plaintiff was screaming in excruciating pain. After

two hours, plaintiff pleaded with "defendants" to "stop torturing him." The pain was worse because plaintiff was forced to lie on a "cow mat" rather than a mattress and he did not have anything on which to rest his head. The pain in plaintiff's shoulder, neck and back was "intolerable." The restraints caused a "burning sensation" because they "pull[ed] on plaintiff's hands"; the shackles on plaintiff's ankles "cut into his skin."

After four hours, third shift staff members defendants John and Jane Does began blowing a large fan on plaintiff "to drown his crying and shouting of pain." Plaintiff "tremble[d]" from the "cold wind blowing from the large fan."

Plaintiff was kept in restraints for 12 1/2 hours. During that time, plaintiff urinated on himself.

OPINION

I understand plaintiff to contend that each of the defendants violated his rights under the Eighth Amendment for the role they played in placing and keeping him in restraints. A threshold question is what standard the court should use in analyzing this claim.

One possibility is the standard for excessive force cases: "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." Whitley v. Albers, 475 U.S. 312, 320 (1986). Another possibility is the standard for conditions of confinement cases: whether defendants were "deliberately indifferent" to plaintiff's health or safety, or, in other words, whether defendants consciously disregarded a risk of harm. Guzman v. Sheahan, 495 F.3d 852, 857

(7th Cir. 2007). Courts have applied both standards to claims involving the allegedly improper use of restraints on prisoners. Compare Hope v. Pelzer, 536 U.S. 730, 737-38 (2002) (applying deliberate indifference standard to claim that defendants handcuffed prisoner to hitching post for seven hours), and Gruenberg v. Gempeler, No. 10-3391, — F.3d —, 2012 WL 4372512, *3-4 (7th Cir. Sept. 26, 2012) (applying deliberate indifference standard to claim that defendants restrained prisoner for five days), and Key v. McKinney, 176 F.3d 1083, 1086 (8th Cir. 1999) (applying deliberate indifference standard to claim that defendants placed prisoner in handcuffs and shackles for 24 hours), with O'Malley v. Litscher, 465 F.3d 799, 805 (7th Cir. 2006) (applying excessive force standard to claim that defendants placed plaintiff in five-point restraints for several hours, applied them too tightly and refused to allow plaintiff to use bathroom), and Williams v. Burton, 943 F.2d 1572, 1576 (11th Cir. 1991) (applying excessive force standard to claim that defendants placed prisoner in four-point restraints for more than 28 hours). In other cases, the courts have assumed that restraints may violate the Constitution under some circumstances without specifying a standard of review. Murphy v. Walker, 51 F.3d 714, 718 (7th Cir. 1995) ("If Murphy was indeed shackled to the floor of his cell, and we assume his factual allegations are true for the purposes of this appeal, the district court erred in dismissing this claim.") (internal citation omitted); Wells v. Franzen, 777 F.2d 1258, 1264-65 (7th Cir. 1985) ("[P]laintiff's allegations concerning the conditions of his restraint are sufficient to warrant further examination.").

It is unnecessary to decide which standard should apply for the purpose of this order

because the result is the same under either. Regardless of the standard applied, the key question courts have asked in these cases is whether the defendants had a legitimate reason for placing the prisoner in restraints, for restraining him in the particular manner they employed and restraining him for the length of time he was restrained. Gruenberg, 2012 WL 4372512, at *4 (defendants entitled to qualified immunity because they were confronted with "unprecedented" situation in which plaintiff had swallowed "three critical security keys"); O'Malley, 465 F.3d at 805 (restraints justified because prisoner refused to eat and "promised to 'fight to the death' to resist being fed intravenously"); Murphy, 51 F.3d at 718 ("[T]he defendants are entitled to be given an opportunity to demonstrate a legitimate justification for the use of shackles.").

Plaintiff alleges that defendants did not have any legitimate purpose for restraining him in the first place, for the manner in which they restrained him or for the amount of time that he was restrained, particularly because he was complaining about being in excruciating pain the whole time. Although plaintiff never explains *why* the restraints were so painful, at this stage I must accept his allegations as true.

The next issue is whether plaintiff has stated a claim upon which relief may be granted with respect to any defendant in particular. The answer is "yes" with respect to defendant Lindmeier and the John Doe defendants. Plaintiff alleges that it was Lindmeier's decision to place him in the restraints and that the John Doe defendants ignored his cries for help and attempted to muffle them by turning on a fan. Although plaintiff does not allege specifically that Lindmeier or the John Doe defendants had control over the amount

of time plaintiff was restrained or the type of restraints used, it is reasonable to infer at this stage that they did.

Although plaintiff does not know the names of the John Doe officers, that is not a reason for dismissing the claim. "[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996); see also Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (if prisoner does not know name of defendant, court may allow him to proceed against administrator for purpose of determining defendants' identity). Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendants.

At summary judgment or trial, plaintiff will have to prove that Lindmeier was personally involved in the initial decision and that Lindmeier and the John Does were involved in the decisions regarding the manner and duration of plaintiff's restraint. In addition, plaintiff will have to come forward with specific evidence regarding their intent and the harm plaintiff suffered from the restraints. The parties may argue at summary judgment or trial in favor of an excessive force or deliberate indifference standard.

I am dismissing the complaint as to the remaining defendants because plaintiff does

not allege that any of them did anything to violate his constitutional rights. Defendants Rouse, Peterson and Comming are not even mentioned in the body of the complaint. Plaintiff says that defendants Francois and Minning made disrespectful statements toward him, but he does not allege that either of them were involved in the decision to place him in restraints or keep him there. The Court of Appeals for the Seventh Circuit has held that "verbal harassment" of prisoners is "unprofessional and deplorable," but it does not violate the Constitution. DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000). Plaintiff says that defendants Breen and Tremel are medical professionals who refused to order Lindmeier to remove plaintiff's ankle restraints. However, plaintiff does not allege that either of them had authority to tell security staff how to do their jobs, so they cannot be held liable for Lindmeier's actions. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) ("Public officials do not have a free-floating obligation to put things . . righ[t], ... Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job.").

Finally, plaintiff says that he urinated on himself while he was restrained. However, because he does not allege that he told anyone that he needed to use the bathroom, none of the defendants can be blamed for that incident.

ORDER

IT IS ORDERED that

1. Plaintiff Natanael Rivera is GRANTED leave to proceed on his claims that (1) defendant Lindmeier placed him in six-point restraints and leg shackles, in violation of the

Eighth Amendment; and (2) defendant Lindmeier and the John Doe defendants kept plaintiff in the restraints for more than 12 hours, in violation of the Eighth Amendment.

2. Plaintiff's complaint is DISMISSED as to defendants Francois, Minning, Rouse, Peterson, Comming, Dr. Breen and RN Tremel for his failure to state a claim upon which relief may be granted.

3. 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.

4. 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 their documents.

5. 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 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.

6. Plaintiff is obligated to pay the unpaid balance of his filing fees 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 fees have been paid in full.

Entered this 3d day of October, 2012.

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