

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

DAJUAN A. KEY,

Plaintiff,

OPINION AND ORDER

v.

12-cv-422-wmc

MICHAEL MEISNER, TIM DOUMA,
JANEL NICKELS, TONY ASHWORTH,
TIMOTHY ZIEGLER, CAPTAIN HIGBEE,
CAPTAIN MORGAN, TRAVIS BITTLEMAN,
BRIAN NEUMAIER, KAREN ANDERSON,
DR. DALIA SULIENE, MS. POSTLER, MELISSA
RN, JOE REDA, SGT. CICHONANOWICZ,
SGT. RAYMOND MILLONIG, JOHN DOE 1,
and JOHN DOE 2,

Defendants.

Asking for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915, plaintiff DaJuan A. Key alleges that various employees at Columbia Correctional Institution violated his First and Eighth Amendment rights. Key is unable to prepay the full fee for filing this lawsuit, but has made the initial partial payment of \$11.97 required of him under § 1915(b)(1). The next step is determining whether Key's proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). For the reasons provided below, the court finds that Key meets this step as well. He will be allowed to proceed as to the following claims and defendants: (1) excessive force in violation of the Eighth Amendment against defendants Neumaier and Bittleman; (2) failure to protect in violation of the Eighth Amendment against

defendants Meisner, Nickel, Morgan, Higbee, Douma and Ashworth; (3) retaliation under First Amendment against defendants Neumaier, Higbee, Morgan and Ziegler; and (4) deliberate indifference in violation of his Eighth Amendment rights against defendants Suliene, Anderson, and Cichonanowicz.

ALLEGATIONS OF FACT

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). In his complaint, Key alleges -- and the court assumes for purposes of this screening order only -- the following facts to be true:

- Plaintiff DaJuan A. Key is and, for all times relevant to his complaint, was an inmate, confined at the Columbia Correctional Institution ("CCI") in Portage, Wisconsin. Also for all times relevant to his complaint, Key was housed in the upper tier of the disciplinary segregation ("DSI") unit.
- All of the defendants work at CCI. Defendant Michael Meisner is the warden. Defendant Tim Douma is the deputy warden. Defendant Janel Nickels is the Security Director. Defendant Tony Ashworth and Timothy Ziegler are unit managers. Defendants Morgan, Higbee, Bittleman, Neumaier, Cichonanowicz, and Millonig are all correction officers. Defendant Karen Anderson is the Health Services Unit ("HSU") Supervisor. Defendant Suliene is a physician. Defendants Postler, "Melissa RN" and Reda are all nurses.
- Key alleges that on March 31, 2012, at approximately 7:00 a.m., he was denied breakfast. Key complained to defendant Bittleman. Bittleman responded that he should have had his light on or been by his door. Key responded that he does not control the lights, that he is hard of hearing, and that he should have been awakened.
- That same day, at approximately 7:45 a.m., defendant Neumaier came to the upper tier to pass out medications. When Neumaier opened the trap door to pass Key his medication, Key stuck his left arm out of the trap and asked to speak with a captain or sergeant. Neumaier instructed Key twice to pull his arm out of the trap. Key responded that he wanted his breakfast meal.

- At this point, Key alleges that Neumaier grabbed his arm and pulled it out of the food trap and began twisting his wrist, shoulder and arm out of place, and bending Key's fingers back. Key screamed, "you're gonna break my arm." (Compl. (dkt. #1) ¶ 28.)
- Key alleges that Bittleman then approached and began slamming Key's fingers and arm in the foot trap while Neumaier was bending Key's arm.
- Neumaier continued to bend Key's left hand index and middle fingers back until they made a popping sound, at which point, Neumaier released Key's hand and asked, "how does that feel?". (*Id.* at ¶ 31.)
- At the time of this incident, Millonig was the sergeant on duty at DSI.
- At some point after the incident, Captain Higbee asked Key if he would like to be seen by a nurse. Key was then escorted by Higbee to the DSI hearing room. Key explained to Higbee what happened and Higbee took three photos of Key's hand. Key was then escorted to the HSU.
- Defendant Reda treated Key. He washed his wounds and taped his fingers together. Key complained that he could not move his left middle finger and that he was in a lot of pain. Reda instructed the correctional officer that he should be contacted if Key continues to have pain.
- While being escorted back to DSI, Key was informed that he was being moved to a different cell on the lower tier. Key complained that he did not know the inmates that witnessed the incident since he had only been in the segregation unit for two days.
- At some time, Key complained to Sgt. Cichonanowicz that his hand and fingers were severely swollen and in pain and asked to see the nurse. Cichonanowicz denied Key's request and told him to fill out an HSU slip per Captain Higbee's orders.
- On March 31, 2012, Key wrote defendant Michael Meisner about the incident. On April 5, 2012, Key spoke with defendant Tim Douma. Key also wrote to defendant Janel Nickels, and wrote to and spoke with defendant Tony Ashworth. Key complains that Ashworth completely ignored his concerns. Key also wrote to defendant Karen Anderson, but she did not respond.
- Key alleges that on April 4, 2012, Neumaier came to Key's door to ask Key whether he was going to see the nurse for a sick call. Key responded yes, but Neumaier walked off and denied Key access to the nurse. The nurse also did not check to see why Key was not escorted to HSU.

- Key alleges that his hand was not x-rayed until April 3, 2012, some four days after the injury, and that he was not seen by HSU until April 13, 2012, after he had submitted several HSU request forms. Key also alleges that he was not given ice until April 19, 2012.
- On April 19 and May 4, 2012, it appears from the complaint that Key was seen by Dr. Dalia Suliene. Key alleges that Suliene refused to look at his middle finger and refused to order a cat scan to determine why the swelling had not subsided.
- On April 20, 2012, defendants Morgan and Ziegler found Key guilty of battery to an officer and gave Key 360 days of disciplinary segregation. Key contends that the committee refused to consider certain statements that were made during the due process hearing that Key was removed from the unit.
- At some unknown time, Key also alleges that defendant Bittleman and Neumaier placed Key on segregation loaf and bag meal and would throw his food on the floor. Key asked defendant Nickels to separate him from Neumaier and Bittleman, but his request was ignored.
- Key also alleges that Neumaier and Bittleman would attempt to intimidate him by saying that the Columbia Sheriff Department detective assigned to investigate his John Doe complaint was not interested in interviewing him.
- Key contends that defendant Higbee, Meisner, Nickel, Morgan, Douma, and Ashworth are all administrative officials, responsible for maintaining a safe environment, and that they each knew about Neumaier's and Bittleman's history of injuring inmates. Key contends that all these defendants turned a blind eye to his complaint by failing to install security cameras or by removing defendants Neumaier and Bittleman.
- Key contends that he filed grievances with CCI, which were rejected and that his appeal was denied.

OPINION

Key asserts four causes of action: (1) excessive force against Neumaier and Bittleman; (2) failure to take action against Meisner, Nickel, Morgan, Higbee, Douma and Ashworth; (3) retaliation under First Amendment against Neumaier, Higbee, Morgan

and Ziegler;¹ (4) failure to provide adequate medical attention against John Doe I, Reda, Melissa, Dr. Suliene, Karen Anderson, and Cichonanowicz.

I. Excessive Force

The Eighth Amendment prohibits conditions of confinement that “involve the wanton and unnecessary infliction of pain.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force “was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. *Whitley v. Albers*, 475 U.S. 312, 321 (1986); *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir. 2001). In *Hudson*, 503 U.S. at 9-10, the Court explained that while the extent of injury inflicted is one factor to be considered, the absence of a significant injury does not bar a claim for excessive force so long as the officers used more than minimally necessary force.

Here, Key alleges that Neumaier and Bittleman used excessive and gratuitous force unnecessarily inflicting severe pain and injuring his left hand. At this early stage of the

¹ Key also alleges that these defendants retaliated against him in violation of his Eighth Amendment rights, but there is no such cause of action under that amendment.

proceedings, Mitchell's allegations are sufficient to state a claim of excessive force under the Eighth Amendment against defendants Neumaier and Bittleman. Key should be aware, however, that to be successful on this claim he will have to *prove* that defendants used force maliciously and sadistically to cause him harm.

II. Failure to Protect

Key also alleges that defendants Meisner, Nickel, Morgan, Higbee, Douma and Ashworth violated his Eighth Amendment rights by failing to "take action." (Compl. (dkt. #1) ¶ 53.) The court construes this claim as a "failure to protect" claim in violation of the Eighth Amendment of the United States Constitution. To state such a claim, plaintiff must plead sufficient facts to allow an inference to be drawn that: (1) he faced a "substantial risk of serious harm"; and (2) the prison officials identified acted with "deliberate indifference" to that risk. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994); *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005).

Key alleges generally that these defendants were aware of Neumaier's and Bittleman's "propensity for violence towards inmates in the DS-1 unit and were aware that in the past many inmates had been assaulted by these officers." (Compl. (dkt. #1) ¶ 53.)² This is a broad, vague allegation. Since Key is being allowed to proceed with other claims, however, the court will allow him to proceed with this claim as well, with the

² Key also alleges that he placed each of these defendants on notice by letters or oral complaints of his March 31, 2012, encounter with Neumaier and Bittleman. However, defendants would have had to have been aware of a threat of danger *before* March 31, 2012, to be liable for failing to protect him from Neumaier's and Bittleman's alleged use of excessive force on that date.

understanding that he will have to *prove* each of the named defendants were individually aware of this propensity, were in a position to change it, and instead ignored it, not just that the “institution” as a whole was aware of it.

III. First Amendment 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). Key alleges that defendants Neumaier, Higbee, Morgan and Ziegler retaliated against him for complaining about Neumaier’s and Bittleman’s alleged excessive force. Specifically, Key alleges that (1) Neumaier “use[d] the prison disciplinary system” to retaliate against Key; (2) Higbee retaliated by removing Key from the top tier; and (3) Morgan and Ziegler found Key guilty in the prison disciplinary proceeding in retaliation of his complaint.

To plead such a claim, Key must allege that: (1) he was engaged in a constitutionally protected activity; (2) he suffered a deprivation that would likely deter a person from engaging in the protected activity in the future; and (3) the protected activity was a motivating factor in defendants’ 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)).

A prisoner’s right to use available grievance procedures has been recognized as a constitutionally protected activity. *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005). Key alleges that as a result of his protected activity of challenging Neumaier’s and Bittleman’s conduct, he was moved to a different tier and made the subject of a conduct

report for which he was ultimately found guilty. At this stage, Key has sufficiently plead a claim of retaliation in violation of the First Amendment against defendants Neumaier, Higbee, Morgan and Ziegler, though the timing and details have yet to be proved.³

IV. Deliberate Indifference

The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To state a deliberate indifference claim, a plaintiff must allege facts from which it may be inferred that he had a serious medical need and that prison officials were deliberately indifferent to that need. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997). Here, Key claims that defendants John Doe 1, Reda, Melissa, Dr. Suliene, Karen Anderson, and Cichonanowicz were deliberately indifferent in their treatment of his injured fingers.

“Serious medical needs” include: (1) conditions that are life-threatening or that carry risk of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; or (3) conditions that have been “diagnosed by a physician as mandating treatment.” *Gutierrez*, 111 F.3d at 1371-73. A prison official has acted with deliberate indifference when the official “knew of a substantial risk of harm to the inmate and acted or failed to

³ For example, unless Key is challenging that his act of reporting on the cause of his injuries during his initial medical exam constituted protected activity and motivated his immediate relocation, the allegation against Higbee would appear to have preceded any formal complaint process.

act in disregard of that risk.” *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002)).

This may be Key’s weakest claim of all because Key fails to describe clearly whether his injuries ever presented a “serious medical need,” the court will allow Key to proceed beyond the screening stage on his Eighth Amendment claim against three of the defendants. Key alleges that he complained to Cichonowicz about his severely swollen and painful hand and fingers and asked to see a nurse, and that defendant Cichonowicz denied his request, requiring him to complete an HSU request. This is sufficient to state a claim for deliberate indifference against Cichonowicz. As for Dr. Suliene, Key alleges that Suliene refused to examine his finger and failed to adequately treat the swelling. Finally, as for Karen Anderson, the HSU supervisor, Key alleges that his hand was not x-rayed until April 3, 2012, and that he was not seen by HSU until April 13, 2012, after he had submitted several HSU request forms. These allegations are sufficient to state a claim against Suliene and Anderson.

The court, however, will deny Key leave to proceed against John Doe 1, Reda and Melissa RN. The only allegation in the complaint against defendant Reda is that he treated Key’s fingers by washing his wounds and taping his fingers together, and that he instructed the correctional officer that he should be contacted if Key continues to have pain. This allegation does not support a claim for deliberate indifference. Moreover, the complaint contains *no* allegations against Melissa RN or John Doe 1. Perhaps plaintiff intended to name one of these two defendants as the nurse who allegedly failed to check

to see why Key was not escorted to HSU on April 4, 2012, for an appointment. Regardless, the allegation does not state a claim for deliberate indifference.⁴

While Key's allegations against defendants Suliene, Anderson, and Cichonanowicz pass muster under the court's lower standard for screening, he should be aware that to be successful on his claim, he will have to prove defendants' deliberate indifference, which is a high standard. Inadvertent error, negligence or gross negligence are insufficient grounds for invoking the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Key's burden to prove: (1) his medical conditions constituted serious medical needs, which may well require expert testimony rebutting medical evidence to the contrary; and (2) perhaps even more daunting, that the defendants knew his condition was serious and deliberately ignored his pain.

ORDER

IT IS ORDERED that:

- 1) Plaintiff DaJuan A. Key's request to proceed on his Eighth Amendment excessive force claim against defendants Brian Neumaier and Travis Bittleman is GRANTED.
- 2) Plaintiff's request to proceed on his Eighth Amendment failure to protect claim against defendants Michael Meisner, Janel Nickels, Captain Morgan, Captain Higbee, Tim Douma and Tony Ashworth is GRANTED.

⁴ Key also names Ms. Postler as a defendant, identifying her as another nurse. There are no allegations directed to her in the complaint, nor does he name her as a defendant in the specific paragraph alleging deliberate indifference in violation of his Eighth Amendment rights. Accordingly, the court will deny Key leave to proceed against Ms. Postler as well.

- 3) Plaintiff's request to proceed on his First Amendment retaliation claim against defendants Brian Neumaier, Captain Higbee, Captain Morgan and Timothy Ziegler is GRANTED.
- 4) Plaintiff's request to proceed on his Eighth Amendment deliberate indifference claim against defendants Dr. Dalia Suliene, Karen Anderson, and Sgt. Cichonanowicz is GRANTED; plaintiffs' request to proceed on his Eighth Amendment deliberate indifference claim against defendants John Doe 1, Reda, Melissa RN, and Ms. Postler is DENIED, and those defendants are DISMISSED.
- 5) Any claim asserted against defendant Sgt. Millonig is DENIED, and he is DISMISSED.
- 6) For the time being, 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.
- 7) 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.
- 8) 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 warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.
- 9) 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.

Entered this 23rd day of September, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge