IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JERRY LEE LEWIS,

OPINION AND ORDER

Plaintiff,

13-cv-457-bbc

v.

TIMOTHY HAINES, J. SWEENEY,
B. KOOL, SGT. KUSSMAUL,
C.O. TAYLOR, C.O. McDANIELS
and C.O. BARR,

Defendants.

- -

Pro se plaintiff Jerry Lee Lewis has filed a proposed complaint under 42 U.S.C. § 1983 about the conditions of his confinement at the Wisconsin Secure Program Facility. The complaint is lengthy (more than 60 pages), but focuses on a single issue regarding the way plaintiff was restrained during out of cell movement from March 2012 through May 2012.

Plaintiff alleges that his wrists and ankles are so large that ordinary restraints are too small for him and that his shoulders are so broad that he needs to be handcuffed in the front rather than the back. From 2009 to the beginning of 2012, plaintiff had a medical restriction that required the use of larger restraints. In addition, staff had a consistent practice of cuffing him in the front using a waist belt. However, in March 2012, most staff stopped using the larger restraints and began handcuffing plaintiff behind his back, which

caused him great pain. After plaintiff complained many times, defendant Jerry Sweeney, the security director, again approved the use of larger restraints, but plaintiff continued to suffer great pain because officers continued to cuff plaintiff behind his back rather than in the front. Beginning on May 31, 2012, defendant Sweeney approved a "double cuff" restriction.

Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C § 1915A to determine whether it states a claim upon which relief may be granted. Having reviewed the complaint, I conclude that plaintiff may proceed on a claim under the Eighth Amendment with respect to all of the defendants with the exception of defendant Timothy Haines. Because plaintiff does not allege that Haines knew about the problem until after it was fixed, the complaint must be dismissed as to Haines.

OPINION

Plaintiff's claim regarding the use of restraints is governed by the Eighth Amendment, which prohibits cruel and unusual punishment. However, the Supreme Court has stated that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual," Rhodes v. Chapman, 452 U.S. 337, 346 (1981), so the initial question is what the standard should be to review plaintiff's 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 substantial risk of serious 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, 697 F.3d 573, 579-80 (7th Cir. 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). See also Santiago v. Walls, 599 F.3d 749, 757 (7th Cir. 2010) (referring to both excessive force standard and deliberate indifference standard in discussing use of handcuffs in prison) 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.").

In this case, I conclude that the deliberate indifference standard should apply. The Supreme Court has explained that the excessive force standard is appropriate when "corrections officials must make their decisions 'in haste, under pressure, and . . . without the luxury of a second chance."' Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting Whitley, 475 U.S. at 320). That is not the situation in this case because none of the uses of restraints at issue in plaintiff's complaint relate to a disturbance or any type of emergency. Rather, each occurred in the context of a routine movement from one part of the prison to another.

I conclude that plaintiff has stated a claim upon which relief may be granted against most of the defendants under a deliberate indifference standard. Plaintiff alleges that defendants Taylor, McDaniels and Barr were correctional officers who repeatedly used normal size restraints on him and handcuffed him in the back despite plaintiff's protests of pain and despite the availability of larger restraints and a waist belt that would have allowed plaintiff to be handcuffed in the front. He alleges that he complained to defendants Sweeney, Kool and Kussmaul but they refused to take action for several weeks and then Sweeney approved a change in the size of the restraints without making an accommodation for the pain plaintiff experienced while being cuffed behind his back. Those allegations are

sufficient at this stage to show that each of those defendants knew that plaintiff was being subjected to a substantial risk of serious harm and they consciously refused to take reasonable measures to prevent the harm from occurring. Although plaintiff does not allege that he has experienced long term medical problems, the pain he says he experienced at the time is sufficient to state a claim under the Eighth Amendment. Smith v. Knox County Jail, 666 F.3d 1037, 1039-40 (7th Cir. 2012); Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 830 (7th Cir. 2009). At summary judgment or trial, plaintiff will have to come forward with specific evidence of harm and defendants' knowledge of it.

One potential wrinkle in plaintiff's claim is that he admits that each of the uses of the restraints occurred when *he* was requesting to be moved for reasons such as law library visits or recreation. The defendants were not forcing him to use the restraints. Thus, plaintiff could have chosen not to use the restraints and then sued over the deprivation of a particular activity. Although defendants are free to argue at summary judgment or trial that plaintiff's own choices caused his harm, cf. Freeman v. Berge, 441 F.3d 543, 547 (7th Cir. 2006) (no Eighth Amendment violation when prisoner deprived of meals because of his refusal to abide by prison's meal-time rules), at this stage of the proceedings I decline to dismiss the case simply because plaintiff declined to give up his right to exercise or to gain access to the courts.

I do not understand plaintiff to be alleging that defendants continued to violate his rights after defendant Sweeney issued a "double cuff" restriction on May 31, 2012. (Plaintiff does not explain what a "double cuff" restriction is, but I assume it means that officers used

two sets of connected handcuffs rather than one so that plaintiff did not have to stretch his arms behind his back so far.) Although it is clear that plaintiff's preference is to be handcuffed in the front rather than the back, he does not include any allegations about harm he suffered after May 31, much less that any of the defendants were aware of any harm after that time, so I could not allow him to proceed on such a claim.

Finally, I am dismissing the complaint as to defendant Timothy Haines, the warden. Plaintiff does not allege that Haines had any personal involvement in the case until July 30, 2012, after the other defendants made the changes to the way they restrained plaintiff. Plaintiff seems to blame Haines for failing to intervene sooner, but that theory does not state a claim upon which relief may be granted because plaintiff does not allege that Haines had any knowledge of what the other defendants were doing before July 2012. Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir. 2009) ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise."). In addition, plaintiff says that Haines may have "covered up" the misconduct of the other defendants after the fact, but a prison official may be held liable under § 1983 only if he *caused* the constitutional violation; plaintiff may not sue individuals for failing to correct a violation that has already occurred. Burks, 555 F.3d 592, 596 (7th Cir. 2009) (rejecting "contention that any public employee who knows (or should know) about a wrong must do something to fix it"); George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007) (rejecting argument "that anyone who knows about a violation of the Constitution, and fails to cure it, has violated the Constitution himself"); Strong v. David, 297 F.3d 646, 650 (7th Cir.

2002) ("[T]he Constitution . . . does not require states to prosecute persons accused of wrongdoing.").

ORDER

IT IS ORDERED that

1. Plaintiff Jerry Lee Lewis is GRANTED leave to proceed on his claims that (a) defendants C.O. Taylor, C.O. McDaniels and C.O. Barr knew that the restraints they were using on plaintiff for out-of-cell movement from March 2012 through May 2012 were subjecting plaintiff to a substantial risk of serious harm, but they failed to take reasonable measures to prevent the harm, in violation of the Eighth Amendment; (b) plaintiff complained to defendants Jerry Sweeney, B. Kool and Sgt. Kussmaul about the type of restraints used, but they refused to take reasonable measures to help plaintiff until May 31, 2012.

2. Plaintiff's complaint is DISMISSED as to his claim against defendant Timothy Haines for plaintiff's 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 his 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 their 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 plaintiffs' institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiffs' trust fund accounts until the filing fees have been paid in full.

Entered this 20th day of August, 2013.

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