IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TOMMIE CARTER,

OPINION and ORDER

Plaintiff,

14-cv-399-bbc

v.

SANDRA M. ASHTON,
RYAN P. ARMSON, TRACY R.
KOPFHAMER, MIKE A. MORRISON,
JASEN B. MILLER, JOSEPH W.
CICHONIWICZ, TROY HERMANS,
CRAIG A. TOM and PHILIP J. KERCH,

Defendants.

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Pro se prisoner Tommie L. Carter has filed a proposed complaint under 42 U.S.C. § 1983 in which he asserts three claims: (1) defendants Sandra M. Ashton, Ryan P. Armson, Tracy R. Kopfhamer, Mike A. Morrison, Jasen B. Miller and Joseph W. Cichonowicz used excessive force against him, in violation of the Eighth Amendment; (2) defendant Philip J. Kerch failed to provide adequate medical care after the use of force, in violation of the Eighth Amendment; and (3) defendants Craig A. Tom and Troy Hermans denied plaintiff's request to delay a disciplinary proceeding, in violation of the due process clause of the Fourteenth Amendment. Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 2815(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915A.

Having reviewed plaintiff's complaint, I conclude that he may proceed on his excessive force and medical care claims under the Eighth Amendment, but I am dismissing his claim under the due process clause for his failure to state a claim upon which relief may be granted.

In his complaint, plaintiff fairly alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Tommie Carter is a prisoner at the Green Bay Correctional Institution. At the time relevant to this lawsuit, he was housed at the Columbia Correctional Institution in Portage, Wisconsin and then at the Wisconsin Secure Program Facility in Boscobel, Wisconsin.

A. Use of Force

On February 27, 2013, defendants Sandra M. Ashton, Ryan P. Armson, Tracy R. Kopfhamer, Mike A. Morrison, Jasen B. Miller and Joseph W. Cichonowicz (all correctional officers) were escorting plaintiff to a different cell. Plaintiff's hands were cuffed behind his back and his legs were shackled. Plaintiff did not resist or threaten the officers in any way.

Without warning, defendants Ashton, Armson, Kopfhamer, Cichonowicz and Morrison shoved plaintiff into the wall, stating "stop resisting." Defendants then shoved plaintiff to the ground, where they began to kick and strike him in the face, right eye, head, upper and lower jaw. After throwing him down the stairs, defendants attempted to break

plaintiff's wrists. Defendant Miller did not try to stop the other officers and may have "kicked and struck" plaintiff as well.

Plaintiff's face, right eye, head, upper and lower jaw were bleeding, swollen and painful. He had lacerations to his face, head neck, back, abdomen, ankles and wrists, and bruises and abrasions on his arms, legs, torso, face and head. However, defendants refused to take pictures of his injuries.

After the use of force, plaintiff was placed in a disciplinary interview room, where he was examined by defendant Philip Kerch, a nurse. However, Kerch refused to provide any medical treatment other than ibuprofen, which plaintiff refused because he suffers from GERD. (Plaintiff says that he discovered later that Kerch failed to state in his progress notes that plaintiff sustained multiple injuries as the result of a beating.)

On February 27 and 28, 2013, Carter submitted sick call requests for medical treatment for pain and swelling, but he was not given any.

B. Disciplinary Hearing

On March 1, 2013, plaintiff was transferred from the Columbia prison to the Boscobel prison. On March 4, 2013, plaintiff received a conduct report for behavior related to the incident on February 27. The report included charges for battery, disruptive conduct and disobeying orders and included allegations that plaintiff had refused to face forward when ordered and then assaulted defendant Ashton.

Plaintiff asked defendant Craig Tom, the hearing officer, for a stay of the proceedings

until he received his property, including his "written statement." Defendant Tom denied plaintiff's request for a stay and held a hearing on March 7, 2013. Plaintiff says that he was prejudiced by the refusal to grant the stay because "when he began quoting his defenses from his statement [from memory], defendant Tom did not write it down, only wrote down what he wanted to, making it more easier to believe the report writer." Plt.'s Cpt. ¶ 39, dkt. #1.

Defendant Tom found plaintiff guilty of battery and disobeying orders, but not guilty of the other charges. Tom relied on the "staff statement" in the conduct report, "physical evidence" and a photo of defendant Ashton. However, the photo did not show any injuries to Ashton's "face, nose or mouth." Tom gave plaintiff a punishment of 300 days in punitive segregation. Plaintiff appealed to defendant Troy Hermans, the deputy warden, who affirmed the decision.

OPINION

A. Use of Force

In determining whether an officer has used excessive force against a prisoner in violation of the Eighth Amendment, the question is "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). The factors relevant to making this determination include:

- the need for the application of force;
- the relationship between the need and the amount of force that was used;

‣ the extent of injury inflicted;

‣ the extent of the threat to the safety of staff and inmates, as reasonably perceived; by the responsible officials on the basis of the facts known to them;

‣ any efforts made to temper the severity of a forceful response.

Id. at 321.

In this case, plaintiff alleges that defendants Ashton, Armson, Kopfhamer Cichonowicz and Morrison struck and kicked him many times, threw him down the stairs and attempted to break his wrists without any provocation from plaintiff. These allegations are sufficient to state a claim under the Eighth Amendment.

Plaintiff says that Miller either joined in the use of force or failed to try to stop others. A public employee may be liable under § 1983 for failing to intervene to stop the constitutional violation committed by another employee. George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007); Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004); Windle v. City of Marion, 321 F.3d 658, 663 (7th Cir. 2003). This duty extends to supervisory and nonsupervisory officials alike, but it is limited to those situations in which the defendant has a reasonable opportunity to prevent the violation. Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994). At this stage of the proceedings, I will assume that defendant Miller either participated in the use of force or had a reasonable opportunity to intervene and failed to do so.

B. Medical Care

A prison official may violate the Eighth Amendment if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by consciously failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment?

(3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

In this case, plaintiff alleges that he was suffering from pain, bleeding and swelling, so it is reasonable to infer that he had a serious medical need. In addition, plaintiff alleges that Kerch saw all of his injuries, but the only treatment Kerch offered was ibuprofen, which

Kerch knew that plaintiff could not take because he suffers from GERD. Accordingly, it is reasonable to infer that Kerch consciously failed to take reasonable measures to treat plaintiff.

At summary judgment or trial, it will be plaintiff's burden to show that a reasonable jury could find in his favor on each of these elements. Henderson v. Sheahan, 196 F.3d 839, 848 (7th Cir. 1999). In particular, he will have to come forward with specific evidence that he had a serious injury and that defendant Kerch's actions were "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted).

Before turning to plaintiff's next claim, I believe that it is important to note the striking similarity between plaintiff's allegations in this case and a previous case that he filed. Carter v. Belz, No. 12-cv-301-slc (W.D. Wis.). In case no. 12-cv-301-bbc, plaintiff alleged that several correctional officers attacked him without any provocation, told him to "stop resisting," shoved him, threw him to the floor, tried to break his wrists and kicked him and struck him in the face, causing lacerations on his face and scalp, numerous cuts, bruises and abrasions and an injury to his right eye.

Just as in this case, plaintiff alleged that he did not resist defendants in any way, that other officers refused to intervene to help him and that the officers refused to take pictures of his injuries. In addition, in both cases plaintiff alleges that medical staff gave him no treatment except ibuprofen despite his GERD and then ignored his later requests for care. These surprising similarities are even more remarkable in light of the seriousness of the

allegations and the fact that they involve a different set of defendants.

At the pleading stage, courts are required to accept a plaintiff's allegations as true, even if they seem unlikely. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") (internal quotations omitted). However, I note that, in case no. 12-cv-301-slc, Magistrate Judge Stephen Crocker found at summary judgment that a "video recording clearly establishes that most of what Carter says simply is not true." Carter v. Belz, No. 12-cv-301-slc (W.D. Wis. Oct. 18, 2013), dkt. #95. And in two recent cases, the Court of Appeals for the Seventh Circuit referred cases to the United States Attorney for possible prosecution of perjury after concluding that the plaintiff had engaged in a pattern of making false allegations. Neal v. LaRiva, 765 F.3d 788, 790 (7th Cir. 2014); Rivera v. Drake, 767 F.3d 685, 687 (7th Cir. 2014). The court stated that "[t]he judicial system cannot function if the only consequence of lying is the loss of a suit that would have had no chance from the outset, had the truth been told. That's effectively no sanction at all. If perjury pays benefits when it escapes detection, but has no cost when detected, there will be far too much perjury and the accuracy of judicial decisions will be degraded." Rivera, 767 F.3d at 687. In light of Neal and Rivera, plaintiff should consider the reasons that he brought this lawsuit and whether his allegations can be supported with admissible evidence.

C. Due Process

I understand plaintiff to be contending that defendant Tom violated his right to due process by refusing to postpone his disciplinary hearing until after he received his property that was being transferred from his previous prison and that defendant Hermans is responsible as well because he affirmed Tom's decision. Plaintiff also includes an allegation that he requested the video of the incident, but he does not say whether that request was approved and he does not include a denial of evidence in the summary of his claim, Cpt. ¶ 55, dkt. #1, so I have not considered that issue.

The first question is whether plaintiff was deprived of his liberty within the meaning of the due process clause. In the prison context, a prisoner is not entitled to process under the Constitution unless he is subjected to an "atypical and significant hardship." Sandin v. Conner, 515 U.S. 472, 484 (1995). I will assume for the purpose of this screening order that a sentence of 300 days in "punitive segregation" is sufficient to meet that standard. Marion v. Columbia Correctional Institution, 559 F.3d 693, 697 (7th Cir. 2009) (disciplinary segregation can trigger due process protections depending on the duration and conditions of segregation; prisoner stated a claim under the due process clause by alleging that he was placed in segregation for 240 days without due process).

The next question is whether plaintiff received the process he was due. Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has determined the process a prisoner is due before he is placed in long-term segregation. When a prisoner loses good time credits, courts have held that a prisoner is entitled to: (1) written notice of the claimed

violation at least 24 hours before hearing; (2) an opportunity to call witnesses and present documentary evidence (when consistent with institutional safety) to an impartial decision maker; and (3) a written statement by the fact-finder of the evidence relied on and the reasons for the disciplinary action. Wolff v. McDonnell, 418 U.S. 539 (1974); Scruggs v. Jordan, 485 F.3d 934, 939 (7th Cir. 2007). However, plaintiff did not lose good time credits, so that standard does not necessarily apply in this case.

In Wilkinson v. Austin, 545 U.S. 209, 226 (2005), the Supreme Court considered the process a prisoner was due before being transferred to a "supermax" prison and concluded it was sufficient if the prisoner received notice of the reasons for the transfer and an opportunity to rebut those reasons. Because one of the conditions of the facility at issue in Wilkinson was placement in segregation, the process required in that case is instructive. Thus, it is questionable whether plaintiff had a right to call witnesses, present particular pieces of evidence or even have a hearing in this case. Id. at 228. ("Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated.").

Regardless whether the standard in Wolff or Wilkinson applies, plaintiff does not state a claim upon which relief may be granted under the due process clause because neither case gave plaintiff the right to postpone the disciplinary hearing, at least under the circumstances of this case. Plaintiff says that he wanted to postpone the hearing until he received his property from his previous prison, but the only item he says he wanted was a

statement that he had written before his transfer. He does not suggest that he was unable to remember the incident by the time of the hearing (approximately one week after the incident); in fact, he does not suggest that there were any details in his written statement that he was unable to convey to defendant Tom at the hearing. Rather, he seems to believe that he was prejudiced because his lack of a written statement "ma[de] it . . . easier [for Tom] to believe the report writer" rather than plaintiff. However, I am not aware of any authority supporting a view that a prisoner has a right under the due process clause to read a written statement simply so that he can appear more credible to the hearing examiner. Even if that were the law, plaintiff does not allege that anyone stopped him from preparing a new written statement before the hearing.

In his summary of his claims, plaintiff states that defendant Tom found him guilty even though there was "no evidence to support the charges," but plaintiff admits elsewhere in his complaint that Tom relied on the statement of the officer in the conduct report, which is enough to satisfy the requirements of due process. Superintendent, Massachusetts Correctional Inst. Walpole v. Hill, 472 U.S. 445, 455 (1985) (disciplinary decision sufficient if it is supported by "some evidence"). Even if the officer's statement was false, that is not a reason for challenging the fairness of the *process* plaintiff received. McPherson v. McBride, 188 F.3d 784, 787 (7th Cir. 1999) (court "will not overturn a disciplinary decision solely because evidence indicates the claim was fraudulent"). Accordingly, I am dismissing plaintiff's due process claim for failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Plaintiff Tommie Carter is GRANTED leave to proceed on his claims that: (1) defendants Sandra M. Ashton, Ryan P. Armson, Tracy R. Kopfhamer, Mike A. Morrison, Jasen B. Miller and Joseph W. Cichonowicz use excessive force against him, in violation of the Eighth Amendment; and (2) defendant Philip J. Kerch refused to give plaintiff appropriate medical care, in violation of the Eighth Amendment.

2. Plaintiff is DENIED leave to proceed on his claim that Craig A. Tom and Troy Hermans violated his right to due process by refusing to postpone his disciplinary hearing. Plaintiff's complaint is DISMISSED as to defendants Tom and Hermans.

3. 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 above-referenced 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 the defendants.

4. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendants or to defendants' attorney.

5. 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.

6. 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). 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 accounts until the filing fee has been paid in full.

7. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 13th day of November, 2014.

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