

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

JOSE SOTO,

Plaintiff,

v.

C.O. KELLEY, C.O. GRANT, C.O. DOVOVAN,
C.O. GEE, C.O. CROCKER, TRAVIS BITTLEMAN,
DALIA SULIENE, DIANE LANE, JANEL NICKEL,
SGT. HEINECKE, SGT. ROYCE, SGT. SIRELL,
LORI ALSUM, CAPTAIN RADTKE, C.O. WILEY,
C.O. LAFERVE, and CAPTAIN MORGAN,

Defendants.

OPINION & ORDER

14-cv-514-jdp

Plaintiff Jose Soto is a prisoner at the Waupun Correctional Institution. At the time relevant to his lawsuit, plaintiff was at the Columbia Correctional Institution (CCI), located in Portage, Wisconsin. He filed a proposed complaint under 42 U.S.C. § 1983 alleging that defendants, who are employed at CCI, violated his constitutional rights in several ways. I dismissed his complaint because it violated Federal Rule of Civil Procedure 20 by combining unrelated claims into one lawsuit. I gave plaintiff the chance to choose from among his claims and amend his complaint accordingly. Plaintiff has now filed an amended complaint that focuses on only some of those claims.¹ Dkt. 33.

After considering plaintiff's amended complaint, I will grant him leave to proceed on an Eighth Amendment excessive force claim for an incident that took place on July 18, 2011. Plaintiff alleges that defendants slammed him to the ground and secured his feet with

¹ As a result of plaintiff's pared-down complaint, the caption in this case now includes defendants who were not involved in the incidents at issue. I will dismiss those defendants from this case.

handcuffs. They tried to force him to walk, then dragged him by the chin and neck. Plaintiff may also proceed on a First Amendment retaliation claim against certain defendants for depriving plaintiff of sleep after he mounted a hunger strike to protest the excessive force used against him on July 18.

ALLEGATIONS OF FACT

Plaintiff alleges the following facts in his amended complaint.

On July 18, 2011, plaintiff was restrained in a waist belt with attached handcuffs. Despite the restraint, defendant correctional officer LaFerve slammed plaintiff to the floor and defendant correctional officers Kelley, Grant, Donovan, and Gee restrained plaintiff on the ground. Donovan secured plaintiff's feet with handcuffs instead of leg shackles. Defendants then stood plaintiff up and demanded that he walk, yelling "[w]alk right fucking now!" at him. Plaintiff was unable to walk because of the handcuffs and an injury, but defendants continued, stating "[f]uck this shit! You are going to walk—and fast!" Defendant correctional officer Crocker then took plaintiff by his chin and neck and dragged him approximately 25 feet until other officers stopped him and directed that plaintiff be able to use a wheelchair.

On September 5, 2011, plaintiff had been in disciplinary segregation at CCI for nearly a year and a half. He had mounted a hunger strike to protest the excessive force used against him. In response to the hunger strike, defendant correctional officer Bittelman deprived plaintiff of sleep by repeatedly turning on his light all night for days at a time. Bittelman remarked that as long as plaintiff generated paperwork for Bittelman to complete, Bittelman would make sure that plaintiff did not sleep.

Plaintiff complained through the administrative complaint process and defendants Captain Radtke, Diane Lane, and Janel Nickel reviewed his allegations. They denied his complaint.

ANALYSIS

Plaintiff alleges that defendants are liable under 42 U.S.C. § 1983 for their various roles in using excessive force against him and retaliating against him. To state a claim for a constitutional deprivation under 42 U.S.C. § 1983, plaintiff must show that: (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) defendant intentionally caused that deprivation; and (4) defendant acted under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009). Plaintiff must show that each defendant personally caused or participated in the alleged constitutional deprivation. *See Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003). Each claim to relief must also be “plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff has adequately pleaded plausible claims and will be allowed to proceed on them.

A. Eighth Amendment excessive force

The Eighth Amendment prohibits excessive force against a prisoner. *Hudson v. McMillian*, 503 U.S. 1 (1992). The relevant inquiry 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). That inquiry “turns on factors including the threat reasonably perceived by the guard, the need for and amount of

force used, efforts made to temper the severity of force used, and the injury suffered by the prisoner.” *Boyd v. Pollard*, 621 F. App’x 352, 355 (7th Cir. 2015).

Plaintiff alleges that defendant LaFerve slammed him to the floor and defendants Kelley, Grant, Donovan, and Gee restrained plaintiff on the ground while Donovan secured plaintiff’s feet with handcuffs instead of leg shackles. Defendants then forced plaintiff to walk and yelled and cursed at him when he was unable to do so. Defendant Crocker then took plaintiff by his chin and neck and dragged him approximately 25 feet until other officers stopped him and allowed plaintiff to use a wheelchair. Plaintiff did not include facts explaining what happened just before defendants restrained him. That context would be helpful in determining whether defendants applied the force in good faith. However, based on the facts that plaintiff has alleged, which suggest an extreme use of force, he has stated a plausible claim of excessive force and he will be allowed to proceed on it.

B. First Amendment retaliation

Plaintiff alleges that he staged the hunger strike to protest the use of excessive force against him, and his treatment in prison more generally. It is not clear whether plaintiff’s hunger strike was protected by the First Amendment. *Compare Freeman v. Berge*, 441 F.3d 543, 546 (7th Cir. 2006) (stating that inmates either have no interest or an easily overridden interest in staging “a hunger strike to make a political point”), *with Stefanoff v. Hays Cty., Tex.*, 154 F.3d 523, 527 (5th Cir. 1998) (“[A] hunger strike may be protected by the First Amendment if it was intended to convey a particularized message.”). But for purposes of screening his complaint, I will assume that plaintiff’s conduct was protected.

Plaintiff contends that defendant Bittelman retaliated against him for mounting the hunger strike by repeatedly turning on plaintiff’s light all night to deprive plaintiff of sleep.

“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). To state a First Amendment retaliation claim, plaintiff must “show that: (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was “at least a motivating factor” in the Defendants’ decision to take the retaliatory action.” *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009).

Plaintiff alleges that Bittelman told him that as long as he continued to make paperwork for Bittelman, presumably by continuing his hunger strike, then Bittelman would make sure that plaintiff did not sleep. Bittelman then repeatedly turned on plaintiff’s light all night for many days at a time, depriving him of sleep. Plaintiff has identified his protected activity and the alleged retaliatory acts against him. He has also connected the two by defendant Bittelman’s statement, indicating that plaintiff’s hunger strike was “at least a motivating factor” for the retaliatory acts. Thus, plaintiff will be allowed to proceed on his retaliation claim.

C. Review of plaintiff’s administrative complaint

Finally, plaintiff accuses defendants Captain Radtke, Diane Lane, and Janel Nickel of “malfeasance or at least misfeasance” by denying his complaint regarding these incidents. He alleges that “no DOC employee was held accountable for what [he] experienced while in their care.” Dkt. 33, at 4-5. However, denying a complaint about a past incident, even if the denial was incorrect, does not amount to a constitutional violation. *George v. Smith*, 507 F.3d 605, 609-10 (7th Cir. 2007) (“Ruling against a prisoner on an administrative complaint does not

cause or contribute to the violation.”). Plaintiff may not proceed under § 1983 against these defendants. They will be dismissed.

ORDER

IT IS ORDERED that:

1. Plaintiff Jose Soto is GRANTED leave to proceed on the following claims:
 - a. An Eighth Amendment excessive force against defendants C.O. LaFerve, C.O. Kelley, C.O. Grant, C.O. Donovan, C.O. Gee, and C.O. Crocker for the incidents of July 18, 2011.
 - b. A First Amendment retaliation claim against defendant C.O. Bittelman.
2. Plaintiff is DENIED leave to proceed on his claim of malfeasance against Captain Radtke, Diane Lane, and Janel Nickel.
3. Defendants Dalia Suliene, Sgt. Heinecke, Sgt. Royce, Sgt. Sirell, Lori Alsum C.O. Wiley, Captain Morgan, Captain Radtke, Diane Lane, and Janel Nickel are DISMISSED from this case.
4. 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. Plaintiff should not attempt to serve defendants on his own at this time. 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.
5. 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 or lawyers 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.
6. 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.

7. 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.
8. 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 defendants or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered April 28, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge