IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEIGHTON D. LINDSEY,

Plaintiff,

v.

JOSEPH BEAHM, PAMELA ZANK,
JESSE JONES, JANN JOHNSTON,
ANTHONY MELI, WILLIAM POLLARD,
ED WALL, DAN STRAHOTA
and DANIEL BRAEMER,

Defendants.

OPINION AND ORDER

16-cv-61-bbc

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Pro se plaintiff Leighton Lindsey has filed a complaint under 42 U.S.C. § 1983 regarding his treatment at the Waupun Correctional Institution in 2011. In particular, plaintiff alleges that defendants Jospeh Beahm and Jesse Jones (both correctional officers) used excessive force against him, in violation of both the Eighth Amendment and the equal protection clause. In addition, he says that various other prison officials may be held liable for failing to prevent the assault.

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. § 1915(e)(2) and § 1915A. Having reviewed the complaint, I conclude that plaintiff may proceed on a claim for excessive force against defendants Beahm and Jones. However, I dismissing the

other claims and defendants for plaintiff's failure to state a claim upon which relief may be granted.

OPINION

Plaintiff's primary claim is that defendants Beahm and Jones used excessive force against him on December 23, 2011. Plaintiff alleges that he and Beahm traded insults while Beahm and Jones were escorting him to and from a medical appointment. After plaintiff said, "Fuck you" to Beahm, Beahm began punching and kicking plaintiff while Jones restrained him. When plaintiff tried to drop to the floor, Jones began choking plaintiff while Beahm continued to punch and kick plaintiff. After plaintiff ended up on the floor, Beahm "dropped his knees on [plaintiff's] head and grabbed [his] neck with both hands, pushing down on his head." Beahm and Jones stopped when a supervisor arrived.

These allegations are sufficient to state a claim under the Eighth Amendment. 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 Hudson v. McMillan, 503 U.S. 1, 9-10 (1992), the Court refined this standard, explaining that the extent of injury inflicted was one factor to be considered, but the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force. Similarly, the Court of Appeals for the Seventh Circuit has cautioned district courts not to dismiss claims simply because the defendant used a small amount of force; rather, the court must consider all of the relevant factors. Washington v. Hively, 695 F.3d 641, 642-43 (7th Cir. 2012).

Because plaintiff alleges that Beahm and Jones used force against him without a legitimate security reason for doing so, it is reasonable to infer at this stage of the proceedings that Beahm and Jones acted for the purpose of harming plaintiff. An officer may not use the type of force plaintiff alleges simply because a prisoner insults him or uses offensive language. Accordingly, I am allowing plaintiff to proceed on an Eighth Amendment claim against Beahm and Jones.

Plaintiff says that the same conduct by Beahm and Jones violated his right to equal protection of the laws as well because these defendants did not assault other prisoners housed in the same unit. I am not allowing plaintiff to proceed on an equal protection claim because it is simply a rewording of his excessive force claim. Vukadinovich v. Bartels, 853 F.2d 1387, 1391–92 (7th Cir.1988) (dismissing equal protection claim that overlapped with

claim under different constitutional amendment). To state a claim under the equal protection clause, a plaintiff must do more than allege that he was treated differently. Rather, he must allege that the defendants intentionally treated him less favorably than others who were similarly situated to him. Fares Pawn, LLC v. Indiana Dept. of Financial Institutions, 755 F.3d 839, 846-47 (7th Cir. 2014). In this case plaintiff does not allege that he was targeted because he belonged to a particular group and he does not allege that any other prisoner engaged in a similar verbal altercation with Beahm or Jones. Plaintiff's own allegations suggest that Beahm and Jones used forced against him because of what they viewed as disrespectful conduct, not as an attempt to discriminate against him. Accordingly, I am dismissing plaintiff's claim under the equal protection clause.

I am also dismissing plaintiff's claim against remaining defendants Ed Wall (Secretary of the Wisconsin Department of Corrections), William Pollard (the warden), Dan Strahota (the deputy warden), Pamela Zank (the unit manager), Anthony Meli (a supervising officer), Daniel Braemer (a supervising officer) and Jann Johnston (a complaint examiner). Plaintiff says that each of these defendants may be held liable for Beahm's and Jones's alleged use of force, but he does not allege that any of the other defendants were personally involved in the incident. Rather, plaintiff's theory seems to be that the other defendants may be held liable for failing to *prevent* the attack from happening.

Under Farmer v. Brennan, 511 U.S. 825 (1994), a prison official may be held liable for failing to prevent an assault if he or she is aware of a substantial risk that the assault will occur, but he or she consciously fails to take reasonable measures to prevent the assault. In

this case, plaintiff does not allege that the officials knew Beahm and Jones were going to assault him in particular, which is usually what a prisoner alleges in a case involving a failure to protect. E.g., Gevas v. McLaughlin, 798 F.3d 475, 481 (7th Cir. 2015) (plaintiff gave notice to defendants by informing them of "specific, repeated, imminent and plausible threat" against him); Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996) (per curiam) (in failure to protect cases, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety") (internal quotations omitted). I understand plaintiff to be alleging that officials should have been aware that Beahm posed a risk to *all* prisoners because of previous allegations against Beahm of prisoner abuse. In particular, plaintiff alleges that Beahm "is accused of" putting his finger into a prisoner's mouth after putting the same finger in the prisoner's anus; slamming a prisoner's head into a cell door and stomping on the prisoner's ankles; and "holding an inmate's head under streaming water." More generally, plaintiff alleges that Beahm "is named in more than 2 dozen allegations of abuse against inmates." Plaintiff does not say what he believes that prison officials should have done to prevent the alleged assault against him, but I assume he believes that Beahm should have been fired because of the other allegations or otherwise banned from having any contact with prisoners.

Plaintiff's allegations regarding the other incidents have a number of potential problems. First, some of the other incidents have little in common with plaintiff's own situation other than that they all involve misconduct by Beahm, making it more difficult to draw the inference that the other incidents provide notice of a substantial risk that Beahm

would use excessive force against plaintiff. Second, plaintiff does not provide any context for the other incidents, making it more difficult to evaluate what type of notice the incidents provided to prison officials. Third, plaintiff does not explain how all of the identified officials would have known about these incidents or, if they did know, what authority they would have to fire Beahm or otherwise protect plaintiff.

Even if I assume that the incidents plaintiff describes could give notice to each of the officials that Beahm posed a substantial risk to prisoner safety and that each defendant could have protected plaintiff from Beahm, plaintiff has pleaded himself out of court by admitting that the other incidents are simply accusations. Plaintiff does *not* allege that Beahm has been found guilty of any of the misconduct. Of course, allegations of misconduct against correctional officers are commonplace. If a simple allegation of misconduct were enough to trigger a constitutional duty to fire the officer or keep him away from prisoners, there would be no officers left at the prison.

To the extent that plaintiff is alleging that any of the defendants did not respond reasonably *after* the alleged use of force, that allegation does not state a claim either. Generally, a prison official cannot be held liable for conduct that occurred after the alleged constitutional violation. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002). Although prison officials have an ongoing duty to protect a prisoner from harm, plaintiff does not allege that Beahm or Jones still pose a risk to him. In fact, he could not allege that plausibly because plaintiff is no longer housed at the Waupun prison, where the alleged use of force occurred. Maddox v. Love, 655 F.3d 709, 716 (7th Cir. 2011) (prisoner's request for

injunctive relief mooted by transfer to different prison).

ORDER

IT IS ORDERED that

1. Plaintiff Lindsey Leighton is GRANTED leave to proceed on his claim that defendants Joseph Beahm and Jesse Jones used excessive force against him on December 23, 2011, in violation of the Eighth Amendment.

2. Plaintiff's complaint is DISMISSED as to his claim under the equal protection clause and as to his claims against Ed Wall, William Pollard, Dan Strahota, Pamela Zank, Anthony Meli, Daniel Braemer and Jann Johnston.

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 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 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 their 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. 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 failure to prosecute.

Entered this 29th day of February, 2016.

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