

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

JOHN R. KING,

Plaintiff,

v.

OPINION AND ORDER

DEPUTY ROBERT SPEARS,
DEPUTY BRANT FOLTMAN,
DEPUTY DAVID WALKER, *et al.*,

16-cv-144-wmc

Defendants.

Plaintiff John R. King filed this proposed civil action pursuant to 42 U.S.C. § 1983, claiming that the defendants violated his constitutional rights by using excessive force and retaliating against him for filing this lawsuit. The court previously granted King's request to add defendants and facts and considered it a supplement to his complaint. (Dkt. #19.) He has been permitted to proceed *in forma pauperis* and paid an initial partial filing fee. Accordingly, his complaint and supplement are ready for screening under 28 U.S.C. § 1915A. For the reasons set forth below, the court will now grant him leave to proceed on First and Fourteenth Amendment claims against some, but not all, of the defendants.

ALLEGATIONS OF FACT¹

King is currently incarcerated at the Dane County Jail. Defendants Robert Spears, Brant Foltman, David Walker, Brandi Anderson, Derrick Walker, Sydney Bryant and Kyle McNally appear all to be deputies at that jail.

¹ In addressing any pro se litigant's complaint, the court reads the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court also assumes all well-pled allegations in King's complaint, as well as all reasonable inferences in his favor, as true. *Id.*

On December 30, 2015, King was sent to segregation. Before the deputies entered the cell block, King stated multiple times into a nearby camera, “I will not fight, and I will not resist.” Then King lay on his bunk with his chest down, his hands behind his back, and his legs crossed. At that point, defendants Spears, Foltman, Walker and other deputies entered his cell and began to “choke, punch, knee and kick” King repeatedly in the face, back and on his head. During this assault, King allegedly screamed, “why are you doing this?!” He also tried to fend the deputies off.

As a result of this incident, King suffered six seizures, and his bladder did not function properly for three days, causing him to urinate on himself. During his recovery, King was also placed in segregation and denied medical care.

Sometime after this incident, King apparently began preparing to file this lawsuit alleging excessive force against the officers involved in the December 30 incident. On February 4, 2016, defendant Foltman went to King’s cell and asked him about the lawsuit. Foltman told King that he learned about it from another officer who searched King’s cell and read his paperwork. After King told him that he would not discuss the case with him, Foltman placed King in segregation, where he again asked him to provide more details about the lawsuit. Once again, King refused to discuss it.

At some point during their conversation, Foltman also attempted to take King’s clothes, but he refused that request as well. In response, Foltman, along with “other officers,” entered King’s cell. By that point, King had laid down and “did not resist or fight,” but once again, the officers proceeded to punch, choke and kick King. Finally, when King was placed in a restraint chair, Foltman tried to break his wrist.

OPINION

Plaintiff claims that the officers' actions on December 30, 2015, and February 4, 2016, constituted excessive force, and that the February 4 incident occurred in retaliation for filing or preparing to file this lawsuit.

I. Excessive Force

Because plaintiff was held at the Dane County Jail at the time of both incidents, the court will assume that he was a pretrial detainee each time. His excessive force claim thus arises under the Fourteenth Amendment. *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). To succeed on an excessive force claim under the Fourteenth Amendment, however, a plaintiff must show "that the force purposely or knowingly used against him was objectively unreasonable." *Id.* at 2473. In determining whether plaintiff meets this burden, relevant factors to be considered include "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting."

Id.

A. December 30, 2015

At this stage, plaintiff's allegations related to the original December 30, 2015, incident where defendants Spears, Foltman, Walker and other officers entered plaintiff's cell and choked, punched, kneed and kicked him are sufficient to create an inference that the defendants' actions were objectively unreasonable. Plaintiff alleges that he was

passively laying down when the defendants and others first began physically assaulting him; and it was only after the officers began physically assaulting him that he fought back. Although plaintiff does not explain what actions he took to fight back against the defendants, the fact that there were at least four officers involved in the altercation suggests that the amount of force used upon plaintiff may have been disproportionate to the threat that he presented. Accordingly, plaintiff will be permitted to proceed against Spears, Foltman and Walker on an excessive force claim related to this incident.

Plaintiff will not be permitted to proceed on his claim against any other defendants, however, because he has not included specific allegations implicating those defendants. If plaintiff amends his complaint to describe how other defendants were *each individually* involved in this incident, he will likely be granted leave to proceed on this claim against them as well.

B. February 4, 2016

With respect to the second incident on February 4, 2016, plaintiff's allegations as to Foltman at least create an inference sufficient to state a Fourteenth Amendment excessive force claim. Although the allegations that Foltman placed him in segregation and read his paperwork about this lawsuit do not contribute to an excessive force claim, the allegations that Foltman participated in the cell entry and attempted to break his wrist do. Given that plaintiff alleges that he had was merely lying down on the cell floor and did not resist when Foltman and the other officers entered his cell, Foltman's attempt to break plaintiff's wrist could be held unreasonable given that plaintiff was already wearing restraints at the time. This is true despite plaintiff's previous refusal to hand his clothes to

Foltman, assuming a trial jury agrees that plaintiff's refusal to hand out his clothes does not amount to an act of physical resistance nor warrants Foltman's use of force on plaintiff's wrist, especially given that other officers were present and had already restrained plaintiff at the time Foltman used force on his wrist.

As to the other officers, who allegedly punched, choked and kicked plaintiff when he lay unresisting on the ground, plaintiff does not state *who* was involved in this event. Although plaintiff names several defendants in the caption of his complaint and added multiple defendants in his supplement, he has not specifically alleged the nature of their involvement. If plaintiff amends his complaint to include the names of the other officers involved in this incident, the court will permit him to proceed against them. Accordingly, plaintiff may proceed on his Fourteenth Amendment claim arising from the February 4, 2016, incident, but only against Foltman.

II. First Amendment

Plaintiff's allegations that Foltman and other officers attacked him because of this lawsuit are also sufficient to state a retaliation claim under the First Amendment. "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 claim for retaliation under the First Amendment, plaintiff must allege that: (1) he was engaged in constitutionally protected activity; (2) the defendant's conduct was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the protected activity in the future; and (3) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity. *Gomez v. Randle*, 680 F.3d 859, 866-67 (7th Cir. 2012);

Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).

As to the first and second pleading requirements, plaintiff's paperwork related to this lawsuit is constitutionally-protected activity. If true, Foltman's placement of plaintiff in segregation, followed by various officers punching, choking and attempting to break plaintiff's wrist, would also constitute an adverse action that would chill the speech of a reasonable person. Therefore, the question is whether the facts suggest that the defendants' use of force was motivated by plaintiff's lawsuit against them.

As to Foltman, plaintiff's allegations that Foltman asked questions about the lawsuit immediately preceding his placement of plaintiff in segregation suggests a link between Foltman's adverse treatment of plaintiff and his lawsuit. Plaintiff will thus be permitted to proceed on a retaliation claim against Foltman.

In contrast, plaintiff alleges that "other officers" entered his cell and punched, choked and kicked him, but does not include the names of any other officers involved, or any allegations that these officers knew about this lawsuit. As such, the court cannot evaluate whether the facts suggest that the "other officers" were motivated by this lawsuit. Although plaintiff will not be permitted to proceed against these unnamed officers, he is free to amend his complaint, similar to his Fourteenth Amendment claim, to include more specific information about which officers were involved in this incident and whether their participation was motivated by this lawsuit. At this juncture, however, as plaintiff has not included any allegations tying defendants Anderson, Derrick Walker, Bryant and Kyle McNally to either the December 30 or February 4 incident, they will be dismissed from the lawsuit at this time.

ORDER

IT IS ORDERED that:

- (1) Plaintiff John King is GRANTED leave to proceed on:
 - (a) a Fourteenth Amendment claim against defendants Robert Spears, Brant Foltman and David Walker, related to the December 30, 2015, incident;
 - (b) a Fourteenth Amendment claim against Foltman, related to the February 4, 2016, incident; and
 - (c) a First Amendment retaliation claim against Foltman, related to the February 4, 2016, incident.
- (2) Plaintiff is DENIED leave to proceed against defendants Brandi Anderson, Derrick Walker, Sydney Bryan and Kyle McNally, who are DISMISSED from this lawsuit.
- (3) 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 the defendants' attorney.
- (4) 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.
- (5) The clerk's office will prepare summons and the U.S. Marshal Service shall affect service upon these defendants.
- (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 5th day of October, 2017.

BY THE COURT:
/s/
WILLIAM M. CONLEY
District Judge