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

SHAWN L. EUBANKS, SR.,

Plaintiff,

v.

JACOB DORN, GWENDOLYN VICK, BRIAN FOSTER, ANTHONY MELI, KYLE TRITT, and SERGEANT BEAHM,

Defendants.

OPINION AND ORDER

18-cv-991-wmc

Plaintiff Shawn Eubanks, an inmate at Waupun Correctional Institution ("Waupun"), filed this civil action under § 1983 alleging that the defendants, all Waupun employees, violated his Eighth Amendment rights in a number of ways arising from an April 2018 incident in which his hand was squeezed in a cell slot. Having been permitted to proceed *in former pauperis*, Eubanks' complaint is now before the court for screening pursuant to 28 U.S.C. § 1915A. For the reasons set forth below, the court will grant Eubanks leave to proceed on Eighth Amendment claims against defendants Dorn, Vick and Tritt, as provided below, but defendants Foster, Meli and Beahm will be dismissed.

ALLEGATIONS OF FACT[1]

At all relevant times, Eubanks was incarcerated at Waupun, where defendants were working. Defendants include: Jacob Dorn, a correctional officer; Gwendolyn Vick, a nurse; Brian Foster, the warden; Anthony Meli, the security director; Kyle Tritt, a captain; and

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the following facts based on the allegations in plaintiff's complaint, unless otherwise noted.

Sergeant Beahm.

On or around April 22, 2018, Eubanks was being held in the Restrictive Housing Unit ("RHU"), and Dorn and Vick came to his cell to assess an existing hand injury. They summoned him to the cell door, and Vick asked how his hand was doing. Vick determined that it would be appropriate to bring Eubanks to the Health Services Unit ("HSU") for further evaluation, so Eubanks approached the door and put his uninjured hand through the slot to be handcuffed. However, Dorn shut the slot on Eubanks' hand and applied pressure for several seconds, causing a deep laceration, swelling, pain and drawing blood. Dorn kept the pressure on his hand until other officers arrived at the cell door, and apparently during this time, Vick stood by and said nothing to stop Dorn from injuring Eubanks.

Despite Eubanks' clear injury, Vick apparently did not attempt to treat his hand injury until later that day, but she could not clean the wound through the slot in his cell door at that time. Apparently Eubanks had to wait several more hours until he was called to the HSU, where his hand was cleaned, bandaged and photos were taken.

On April 24, 2018, at about 7:30 a.m., Dorn came to Eubanks' cell, this time to escort him to the showers. During the transport, Dorn allegedly squeezed Eubanks' bicep in a manner that caused him pain. When Eubanks asked him to stop, Dorn responded "you haven't seen nothing yet," gave Eubanks his clothes and walked away. Worried about what Dorn might do next, Eubanks asked Dorn to call a supervisor, but Dorn refused and directed Eubanks back to his cell. As a result of this exchange, Dorn placed a "back of cell" security precaution tag on Eubanks' cell door. Prisoners with this type of precaution are

required to move to the back of their cells, kneel down on the floor, cross their ankles and put their hands on top of their head, any time staff approach their cell doors to open the slot in the cell door. Eubanks believes that Dorn imposed this restriction to punish and humiliate him.

On April 28, 2018, Eubanks submitted a request for information to Sergeant Beahm, and Eubanks sent a courtesy copy of his request to Warden Foster. In it, Eubanks reported that Dorn assaulted him on April 22 and Vick witnessed the attack. He further wrote that he feared for his safety and did not want to have further contact with Dorn, requesting that Dorn be moved to a different area. On April 29, Eubanks submitted a similar request to Security Director Meli. Meli responded on April 30, writing that he was aware of the incident and that Eubanks had been disruptive at his cell door. Meli further wrote that the matter has been reviewed and a video of the incident preserved.

On May 4, 2018, Eubanks submitted another request for information, this time to Captain Tritt, complaining about the back-of-cell restriction, that Dorn had attacked him and that he had never received a conduct report for the incident. Eubanks also wrote that his bulging discs in his back made the restriction very painful for him. According to Eubanks, his back condition caused him not to follow the back-of-cell requirements, which led to him missing several meals during the three or four weeks when he was under that precaution.

OPINION

Plaintiff is seeking to proceed on four types of claims under the Eighth Amendment: (1) an excessive force claim against Dorn; (2) a failure to intervene claim against Vick; (3)

medical care deliberate indifference claims against Vick; and (4) deliberate indifference claims against Beahm, Tritt, Meli and Foster.

I. Excessive Force

For a plaintiff to succeed on an Eighth Amendment excessive force claim, he must submit evidence that the prison official acted "wantonly or, stated another way, 'maliciously and sadistically for the very purpose of causing harm.'" *Harper v. Albert*, 400 F.3d 1052, 1065 (7th Cir. 2005) (quoting *Wilson v. Seiter*, 501 U.S. 294, 296 (1991)). Relevant factors are: (1) the need for the application of force; (2) the relationship between the need and the amount of force used; (3) the extent of injury inflicted; (4) the extent of threat to the safety of staff and inmates, as reasonably perceived by the responsible officials based on the facts known to them; and (5) any efforts made to temper the severity of a forceful response. *Whitley v. Albers*, 475 U.S. 312, 321 (1986). Because prison officials must sometimes use force to maintain order, the central inquiry is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

Plaintiff has alleged enough to move forward with his excessive force claim against Dorn. According to plaintiff, Dorn had no reason to slam the slot door shut on his hand, and he continued to squeeze his hand in a manner that caused him severe pain and for his hand to bleed and require further treatment. Since plaintiff's allegations do not suggest he was acting in a manner that required Dorn to apply *any* force to incapacitate him, at this stage, it is reasonable to infer that Dorn shut the slot on his hand in an effort to hurt him,

and not to restore order.

II. Failure to Intervene

A prison official may be liable for a failure to intervene if he knew about a constitutional violation and had the ability to intervene, but failed to do so "with deliberate or reckless disregard for the plaintiff's constitutional rights." *Koutnik v. Brown*, 351 F. Supp. 2d 871, 876 (W.D. Wis. 2004) (citing *Fillmore v. Page*, 358 F.3d 496, 505-06 (7th Cir. 2004)). Given that plaintiff alleges that Vick stood by and failed to even ask Dorn to stop squeezing the slot on plaintiff's hand, it is reasonable, at this early stage, to infer that Vick acted with deliberate indifference to his constitutional rights. Accordingly, the court will grant him leave to proceed on a failure to intervene claim against Vick.

III. Deliberate Indifference to a Serious Medical Need

Plaintiff also may proceed on an Eighth Amendment medical care deliberate indifference claim against Vick. A prison official may violate the Eighth Amendment if the official is "deliberate[ly] indifferen[t]" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). "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). "A 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Foelker v. Outagamie Cty.*, 394 F.3d 510, 512 (7th Cir. 2005) (quoting *Jackson v. Illinois Medi-Car, Inc.*, 300 F.3d 760, 765 (7th Cir. 2002)). A

medical need may be serious if it, for instance, causes significant pain. *Cooper v. Casey*, 97 F.3d 914, 916-17 (7th Cir. 1996). A plaintiff can prove deliberate indifference if he can establish an objective element -- that the medical need is actually serious -- and a subjective element -- that the official acted with a "sufficiently culpable state of mind" with actual knowledge of the medical need. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997).

As an initial matter, the court will accept that plaintiff's wounded hand constitutes a serious medical need, since he alleges that he suffered from severe pain and that it was bleeding. While plaintiff's allegations do not readily suggest that the care Vick provided was inadequate, it may be reasonable to infer that Vick was responsible for the several-hour delay between Eubanks' injury and when he was finally treated in the HSU. Since a delay that unnecessarily prolongs a prisoner's pain or worsens his condition can support a finding of deliberate indifference, *see Petties v. Carter*, 836 F.3d 722, 730-31 (7th Cir. 2016), the court will grant plaintiff leave to proceed against Vick on this claim.

IV. Deliberate Indifference

Finally, plaintiff seeks to proceed on claims against Beahm, Tritt, Meli and Foster for their alleged failure to protect him from Dorn or end the back-of-cell precaution Dorn placed on him. To start, however, plaintiff may not proceed on a theory that these defendants failed to stop Dorn from harassing him or protect him from a risk that Dorn would hurt him. Certainly, the Eighth Amendment requires prison officials to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994) (internal citations omitted). Yet to state a claim for failure to protect,

a plaintiff must allege: (1) that he was incarcerated "under conditions posing a substantial risk of serious harm"; and (2) his custodians were deliberately indifferent to that substantial risk. *Brown v. Budz*, 398 F.3d 904-910-13 (7th Cir. 2005) (quoting *Farmer*, 511 U.S. at 834).

Here, plaintiff has not alleged that he reported to Beahm, Tritt, Meli or Foster that Dorn had threatened him or followed up in any way suggesting that Dorn posed an ongoing safety threat; indeed, plaintiff has not alleged that he informed them about Dorn allegedly squeezing his bicep in a painful manner during a transport on April 24. Furthermore, plaintiff has not alleged that Dorn *actually* used force against him in a similar manner after those two incidents. Accordingly, plaintiff has not pled facts that give rise to a reasonable inference that he faced a substantial risk of serious harm. Accordingly, plaintiff may not proceed against Beahm, Tritt, Meli or Foster for their alleged failure to move Dorn away from him.

Nor can plaintiff proceed on a theory that they did not stop Dorn's allegedly harassing back-of-cell precaution. Harassment by a prison guard generally is not enough to implicate a prisoner's constitutional rights. *See DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000). Rather, only certain circumstances in which harassment is pervasive enough to cause the prisoner "significant psychological harm" support a claim. *Beal v. Foster*, 803 F.3d 356, 359 (7th Cir. 2015). Here, plaintiff has not provided any other examples of interactions with Dorn suggesting that Dorn consistently harassed plaintiff; Dorn's harassment appears to have been limited to imposing the back-of-cell precaution. However, the decision to impose the precaution, alone, does not give rise to a reasonable

inference that Dorn was causing him significant psychological harm. Accordingly, these named defendants' failure to step in to end the alleged harassment does not give rise to a reasonable inference that they acted with deliberate indifference to a substantial risk of harm.

Plaintiff's complaint that the back-of-cell restriction was incredibly painful requires a bit more discussion. Plaintiff has alleged that he wrote to Tritt and informed him that the precaution is extremely painful for him because of his back problems, imploring him to look into whether the restriction was necessary. It is conceivable that Tritt's alleged failure to take any steps to investigate into whether the precaution remained appropriate could support a reasonable inference that he ignored plaintiff's serious back problems. However, plaintiff has not alleged facts suggesting that he informed Beahm, Meli or Foster that the back-of-cell restriction caused him severe pain. Accordingly, since none of these defendants was aware of plaintiff's allegedly serious medical need, their failure to lift the precaution does not give rise to a reasonable inference of deliberate indifference. Therefore, while plaintiff may proceed on a deliberate indifference claim against Tritt, the court is dismissing Beahm, Meli and Foster from this lawsuit.

ORDER

IT IS ORDERED that:

1) Plaintiff Shawn Eubanks is GRANTED leave to proceed on the following claims:

   (a) An Eighth Amendment excessive force claim against defendant Jacob Dorn.

(b) An Eighth Amendment failure to intervene claim against defendant Gwendolyn Vick.

(c) An Eighth Amendment deliberate indifference claim against defendant Vick for her alleged delay in providing plaintiff medical care.

(d) An Eighth Amendment deliberate indifference claim against defendant Kyle Tritt for his alleged failure to investigate the appropriateness of the back-of-cell-precaution.

2) Plaintiff is DENIED leave to proceed on any other claim, and defendants Meli, Foster and Beahm are DISMISSED.

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 state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing in 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 to the 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) 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 is unable to locate him, his case may be dismissed for failure to prosecute.

7) Plaintiff's motions for screening (dkt. ##13, 14, 20) are DENIED as moot.

Entered this 10th day of November, 2021.

BY THE COURT:
/s/

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WILLIAM M. CONLEY
District Judge