IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

DONTA JENKINS,

OPINION and ORDER

Plaintiff,

17-cv-25-bbc

v.

CAPTAIN MILLER, J. GOUHDE,
LUCAS WEBBER. MICHEAL DITTMAN,
C/O S. TOBI, C/O JITTSWITTS,
C/O SWEENEY and LINDSEY WALKER,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Pro se plaintiff and prisoner Donta Jenkins has filed a complaint about events arising out of an alleged suicide attempt in July 2016 at the Columbia Correction Institution, which is in Portage, Wisconsin. I understand plaintiff to be raising the following claims:

(1) after plaintiff informed defendant Tobi (a correctional officer), "I am going to hang myself," Tobi returned with defendants Miller, Boartz, Sweeney and Jittswitt (all correctional officers), who used excessive force against plaintiff by spraying him with a chemical agent and punching him, in violation of the Eighth Amendment;

(2) the same officers placed plaintiff in "control status" rather than "clinical observation" for 24 hours, during which he had no clothing, property or bedding, in violation of the Eighth Amendment;

(3) after plaintiff was taken out of control status, an unspecified official or officials

placed him in a cell without a mattress, where he remained for 22 days; he complained to defendants Lindsey Walker (the unit manager), Lucas Webber (the security director), J. Gohde (the health services unit manager) and Michael Dittman (the warden), but they refused to help, in violation of the Eighth Amendment;

(4) plaintiff has complained to defendant Dittman about the use of force, but Dittman has not responded.

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. For the reasons explained below, I conclude that plaintiff may proceed on claims (1), (2) and (3), but I am dismissing claim (4) for plaintiff's failure to state a claim upon which relief may be granted.

## OPINION

### A. Excessive Force

I understand plaintiff to be raising two claims about an allegedly excessive use of force. First, he alleges that defendants Tobi, Miller, Boartz, Sweeney and Jittswitt used a chemical agent on him that caused him to "choke uncontrollably" and then held him down and punched him as they were putting handcuffs and shackles on him. Second, he alleges that he complained to defendant Dittman about the excessive force, but Dittman has not responded. I conclude that plaintiff may proceed on the first claim, but the second claim must be dismissed.

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. Plaintiff's allegation that defendants Tobi, Miller, Boartz, Sweeney and Jittswitt responded to plaintiff's expressed intent to harm himself by spraying him with a chemical agent and then punching him is sufficient to state a claim under this standard. Although some force may have been necessary to prevent plaintiff from harming himself, it is reasonable to infer from plaintiff's allegations that the type of force used and the amount of forced used was inconsistent with an effort to keep plaintiff safe.

Plaintiff does not allege that defendant Dittman was involved in the use of force. Rather, he alleges only that Dittman has not responded to his complaints about the use of force since it occurred. Dittman's silence may be unprofessional or even a violation of prison policy, but it does not violate the Constitution. If a supervisory official approves an unconstitutional action before it occurs, he can be held liable for causing the violation.

Nanda v. Moss, 412 F.3d 836, 842 (7th Cir. 2005). But after the conduct at issue is completed, there is nothing the official can do to stop it, so he cannot be held liable. George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007) ("[Plaintiff's] argument on the merits is that anyone who knows about a violation of the Constitution, and fails to cure it, has violated the Constitution himself. That proposition . . . is not correct. Only persons who cause or participate in the violations are responsible."). Presumably, plaintiff wants Dittman to conduct an investigation and discipline the other defendants, but there is no constitutional right to that type of action. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 196, 109 (1989) (Constitution "generally confer[s] no affirmative right to governmental aid."); Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) ("[T]he Constitution . . does not require states to prosecute persons accused of wrongdoing."). Accordingly, I am dismissing the complaint as to plaintiff's claim against defendant Dittman.

## B. Conditions of Confinement

### 1. Control status

Plaintiff says that he should have been placed in "clinical observation" after his suicide attempt, but he was placed in "control status" instead. Plaintiff does not describe the difference between the two placements, but he alleges that he was placed in an empty cell without any clothes, property or furniture.

Plaintiff's allegations describe a situation that is unpleasant and uncomfortable, if not humiliating and degrading. Further, it is not immediately apparent why such a severe

response would be required for a self harm attempt.

Both this court and the Court of Appeals for the Seventh Circuit have allowed claims involving similar conditions to proceed under the Eighth Amendment. Townsend v. Cooper, 759 F.3d 678, 687 (7th Cir. 2014) (prisoner was "completely naked, with no clothing, shoes, bedding, linens, mattress, mail or legal materials"); Vinning-El v. Long, 482 F.3d 923, 924 (7th Cir.2007) (prisoner stripped of his clothing and property in segregation cell); Gillis v. Litscher, 468 F.3d 488 (7th Cir. 2006) (prisoner placed in segregation cell, naked with no mattress or other bedding); Ghashiyah v. Frank, No. 07-C-308-C, 2007 WL 2061053, at *8 (W.D. Wis. July 12, 2007) (plaintiff "held in a cold cell, naked and without access to a bathroom").

Most of the cases cited above involved deprivations that lasted for at least a week and subjected the prisoner to temperature extremes or unsanitary conditions. However, in Ghashiyah, 2007 WL 2061053, at *8, I noted that the Eighth Amendment applies to some shorter term conditions of confinement, even when there is no serious risk of physical harm. As the Supreme Court has noted on multiple occasions, the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Hope v. Pelzer, 536 U.S. 730, 738 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)). Thus, in Hope, 536 U.S. at 738, the Court held that tying a prisoner to a hitching post for several hours could violate the Eighth Amendment in part because it subjected the prisoner to "particular discomfort and humiliation." Along the same lines, the Court of Appeals for the Seventh Circuit has held that strip searches may violate the Eighth Amendment even when they do not inflict

physical harm on the prisoner if they are "motivated by a desire to harass or humiliate rather than by a legitimate justification, such as the need for order and security in prisons." King v. McCarty, 781 F.3d 889, 897 (7th Cir. 2015).

I conclude that a similar standard should govern this claim. For the purpose of determining the sufficiency of the complaint, it is reasonable to infer that defendants Tobi, Boartz, Sweeney and Jittswitt placed plaintiff in control status without any penological justification but simply to harass and humiliate plaintiff. Accordingly, I will allow plaintiff to proceed on this claim. At summary judgment or trial, plaintiff will have to come forward with specific evidence to support his allegations.

2. Mattress

Plaintiff says that he was placed in a cell without a mattress for 22 days, so he was forced to sleep on the concrete floor, which exacerbated injuries to his shoulder and back and caused "extreme swelling and inflammation." Plaintiff does not identify the official or officials who made the initial decision to place him in a cell without a mattress. However, he says that he complained to defendants Lindsey Walker (the unit manager), Lucas Webber (the security director), J. Gohde (the health services unit manager) and Michael Dittman (the warden), and they refused to help him. Although plaintiff does not specify the timing of his complaints to defendants, I will infer that he complained to each of them while he was still without a mattress. I will also infer that each defendant had the authority to provide a mattress to plaintiff. Miller v. Harbaugh, 698 F.3d 956, 962 (7th Cir. 2012)

("[D]efendants cannot be thought to be reckless if the remedial step was not within their power.").

The lack of a mattress or any bedding may support a claim under the Eighth Amendment. Gillis, 468 F.3d at 490–91, 493–94 (inmate provided no clothing, bedding, or mattress for several days and forced him to sleep on concrete floor in cold conditions survived summary judgment on Eighth Amendment claim); Townsend v. Fuchs, 522 F.3d 765, 774 (7th Cir. 2008) ("[C]onfinement in isolation without adequate clothing or bedding supports Eighth Amendment claim.") (citing Maxwell v. Mason, 668 F.2d 361, 363 (8th Cir.1981)); Vinning-El, 482 F.3d at 925; Marshall v. Nickel, No. 06-C-617-C, 2007 WL 5582139, at *9 (W.D. Wis. Jan. 29, 2007). Particularly because plaintiff alleges that sleeping on the floor aggravated injuries to his back and shoulder, I conclude that plaintiff has stated a claim upon which relief may be granted. Farmer v. Brennan, 511 U.S. 825, 837 (1994) (prison official may be held liable under Eighth Amendment for disregarding risk to prisoner's health).

At summary judgment or trial, plaintiff will have to come forward with specific evidence showing that he complained to each defendant while he was still without a mattress, that defendants knew that plaintiff's cell conditions were threatening his health and that they could have taken corrective action, but refused to do so. If plaintiff complained to any of the defendants *after* he was transferred back to a cell with a bed, he should move to dismiss this claim as to those defendants. As discussed above, after the conduct at issue is completed, there is nothing the official can do to stop it, so he cannot be

held liable. George, 507 F.3d at 609.

ORDER

IT IS ORDERED that

1. Plaintiff Donta Jenkins is GRANTED leave to proceed on the following claims:

(1) Defendants Tobi, Miller, Boartz, Sweeney and Jittswitt used excessive force against plaintiff after he stated he was suicidal, in violation of the Eighth Amendment;

(2) defendants Tobi, Miller, Boartz, Sweeney and Jittswitt placed plaintiff in "control status" rather than "clinical observation" without any legitimate reason, in violation of the Eighth Amendment; and

(3) defendants Lindsey Walker, Lucas Webber, J. Gohde and Michael Dittman refused to provide a mattress to plaintiff, in violation of the Eighth Amendment.

2. All other claims are DISMISSED for plaintiff's failure to state a claim upon which relief may be granted.

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 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 defendants.

4. Once the defendants answer the complaint, the clerk of court will set a telephone conference before Magistrate Judge Stephen Crocker. At the conference, Magistrate Judge

Crocker will set a schedule for the case.

5. 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 he shows on the court's copy that he has sent a copy to defendants or their attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

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

Entered this 29th day of March, 2017.

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