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

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CHARLES DESHAWN HALL,

Plaintiff,

v.

DEPUTY SPEARS, DEPUTY MCCARRAGHER,
DEPUTY ANDERSON, ALL JOHN DOE DEPUTIES,
JOHN DOE SHERIFF, DANE COUNTY JAIL,
JOHN DOE NURSE, JOHN DOE DOCTOR,
JOHN DOE U.S. MARSHALS and UNITED STATES
MARSHAL SERVICE,

Defendants.

OPINION and ORDER

17-cv-749-bbc

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Pro se plaintiff Charles Deshawn Hall is a federal inmate incarcerated by the Bureau of Prisons at the Federal Correctional Institution in Oxford, Wisconsin. He filed a proposed civil action under 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1974), alleging that he was injured when deputies at the Dane County jail used pepper spray in close proximity to his cell and that medical staff failed to provide him treatment afterwards. Because he is incarcerated, plaintiff's complaint must be screened under 28 U.S.C. § 1915A. After reviewing his complaint, I conclude that plaintiff may proceed with an excessive force claim against defendant Deputy Spears and a failure to intervene claim against defendants Deputies McCarragher, Anderson and John Does. His claims against John Doe Nurse, John Doe Doctor, John Doe Sheriff, John Doe U.S. Marshals, United States Marshal Service and the Dane County Jail will be dismissed.

Plaintiff's request for assistance in recruiting counsel, dkt. #5, will be denied.

Plaintiff alleges the following facts in his complaint.

ALLEGATIONS OF FACT

In October 2015, plaintiff Charles Deshawn Hall was arrested on federal charges and transported by John Doe U.S. Marshals to the Dane County jail. On July 5, 2016, while plaintiff was still detained at the jail, an asthmatic inmate who was confined in a cell near plaintiff started shaking his cell door and yelling that he could not breathe. Defendants Deputies Spears, McCarragher, Anderson and other John Doe Deputies were in the vicinity, but none of them responded immediately. The asthmatic inmate then threw water in a deputy's face. Defendant Deputy Spears responded by taking out his can of oleoresin capsicum (pepper) spray, shaking it several times and spraying it at the asthmatic inmate twice, for about 3 to 4 seconds each time. Before doing so, Spears did not attempt to secure plaintiff or any other nearby prisoners in the small, enclosed unit from the effects of the spray. Within a few seconds, plaintiff had difficulty breathing, started to cough uncontrollably and vomited. He later developed a pain in his abdomen. He yelled, "I can't breathe," and "I need to be moved." About ten minutes later, defendant Deputy Anderson brought a fan to the unit. Instead of clearing the air, the fan made the situation worse and both plaintiff and Anderson began retching. Plaintiff asked to see a nurse.

Defendant John Doe nurse saw plaintiff and told him to submit a paper request if he wanted to see a doctor. After submitting a written request, plaintiff was seen by defendant

John Doe doctor, who concluded that plaintiff's abdominal pain was likely caused by constipation and gave him a prescription for stool softener, although plaintiff told the doctor that his bowel movements were fine. (Later, at the Sauk County jail, plaintiff was given a diagnosis of a hernia.)

OPINION

A. Excessive Force

To succeed on an excessive force claim under the Fourteenth Amendment, which applies to individuals such as plaintiff held as pretrial detainees at a county jail, a plaintiff must show "that the force purposely or knowingly used against him was objectively unreasonable." Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015). 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.

Plaintiff's allegations are sufficient to state a claim of excessive force against defendants Deputy Spears and failure to intervene claims against McCarragher, Anderson and other John Doe Deputies. He alleges that Spears used pepper spray on two occasions in a small, enclosed area, despite there being no serious risk of harm to anyone from the asthmatic inmate who was locked in his cell and despite knowing that plaintiff and others

were nearby and would be affected. Additionally, he alleges that Spears shook his pepper spray can several times before deploying it, and that none of the deputies attempted to intervene to stop Spears from using it. On the basis of these allegations, I can infer that Spears used more force than was necessary under the circumstances and that the other officers could have intervened but failed to do so. Accordingly, plaintiff may proceed with excessive force and failure to intervene claims against Spears, McCarragher, Anderson and the John Doe Deputies.

B. Medical Care

Plaintiff also contends he was denied adequate medical care after defendant Spears deployed the pepper spray. The Fourteenth Amendment applies to conditions of confinement claims brought by pretrial detainees, but the Court of Appeals for the Seventh Circuit applies the same standard at the screening stage to medical care claims under both the Eighth Amendment and Fourteenth Amendment. Smith v. Dart, 803 F.3d 304, 310 (7th Cir. 2015). I will do the same.

A prison official may violate the Eighth Amendment if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a layperson. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an

individual's daily activities," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but disregard this need by consciously failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Consistent with this standard, plaintiff's medical treatment claims have three elements: (1) Did plaintiff need medical treatment?; (2) Did defendants know that plaintiff needed treatment?; and (3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

Plaintiff's allegations regarding his medical needs are sparse. He alleges that he asked to see a nurse because he was coughing, vomiting and had abdominal pain. He says he was later given a diagnosed of a hernia, though it is not clear when he developed the hernia or why he believes the hernia could be attributable to the pepper spray. To the extent the hernia is a separate injury, which seems likely, any claim regarding misdiagnosis or treatment of the hernia should be brought in a separate lawsuit pursuant to the limitations of Rule 20 of the Federal Rules of Civil Procedure.

Even assuming plaintiff had a serious medical need resulting from exposure to the pepper spray, he has not alleged sufficient facts from which I could infer that either defendant John Doe nurse or John Doe doctor was deliberately indifferent to his need. He does not provide any details about when he saw the nurse, what he told the nurse, what

symptoms he was exhibiting, what treatment he asked for or what treatment the nurse provided, if any. Likewise, he faults the doctor for giving him a diagnosis of constipation, but he does not provide any details about when he saw the doctor, what he told the doctor or what symptoms he was displaying at the time, if any. Without such information, I cannot infer that these defendants were deliberately indifferent to any serious medical need. Accordingly, plaintiff has failed to state any claim for relief against defendants John Doe Nurse or John Doe Doctor.

C. Improper Defendants

Finally, plaintiff names several defendants in the caption of his complaint that will be dismissed. He names the "United States Marshal Service" and John Doe U.S. Marshals on the ground that federal agents were responsible for placing him at the Dane County jail. However, the Marshals Service is not a suable entity, because Congress has not authorized it to be sued in its own name, 28 U.S.C. §§ 561-569 (statutes governing the United States Marshals Service), or implied that it to be sued. Blackmar v. Guerre, 342 U.S. 512, 515 (1952) ("When Congress authorizes one of its agencies to be sued . . . it does so in explicit language, or impliedly because the agency is the offspring of such suable entity."). With respect to the individual marshals, plaintiff must allege facts indicating that the named defendants were personally involved in and responsible for the alleged constitutional violations. Ashcroft v. Iqbal, 556 U.S. 662, 675-76 (2009). He has not done so, so he cannot proceed with claims against the marshals.

Plaintiff also names John Doe Sheriff and the Dane County jail as defendants. A jail

is merely a building and not an entity that can be sued under 42 U.S.C. § 1983. Smith v. Knox County Jail, 666 F.3d 1037, 1040 (7th Cir. 2012). As for the sheriff, he cannot be held liable to plaintiff under § 1983 unless he was "personally responsible" for the alleged constitutional deprivations. Childress v. Walker, 787 F.3d 433, 439 (7th Cir. 2015). A supervisor, such as the sheriff, may be liable if he knew about unconstitutional "conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what [she] might see." Matthews v. City of East St. Louis, 675 F.3d 703, 708 (7th Cir. 2012) (citation omitted). Additionally, a supervisor might be liable for flawed policies or deficient training, over which the supervisor had control, if the policies or training amount to deliberate indifference to the rights of the persons affected by the policies or inadequate training. City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989). In this case, plaintiff's allegations do not permit an inference that the sheriff approved, condoned or turned a blind eye to allegedly excessive force or that he was even aware of the incidents at the time they occurred. Additionally, plaintiff alleges that the defendant deputies involved in the incident *violated* policies of the Dane County jail, which undercuts the claim that there were inadequate policies in place. Finally, plaintiff has included no specific allegations that would permit the court to infer that the deputy defendants' training was inadequate. Accordingly, plaintiff has failed to state a claim against John Doe Sheriff.

D. Motion for Assistance in Recruiting Counsel

Plaintiff has also filed a motion for assistance in recruiting counsel, stating that his confinement will hinder his ability to gather information necessary to litigate this case. Dkt.

#5. A pro se litigant does not have a right to counsel in a civil case, Olson v. Morgan, 750 F.3d 708, 711 (7th Cir. 2014), but a district court has discretion to assist pro se litigants in finding lawyers to represent them. Pruitt v. Mote, 503 F.3d 647, 649 (7th Cir. 2007). A party who wants assistance from the court in recruiting counsel must meet several requirements. Santiago v. Walls, 599 F.3d 749, 760-61 (7th Cir. 2010). First, he must show that he is unable to afford to hire his own lawyer. 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel."). Second, he must show that he has made reasonable efforts on his own to find a lawyer to represent him. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Finally, he must show that the legal and factual difficulty of the case exceeds his ability to prosecute it. Pruitt, 503 F.3d at 654-55.

Plaintiff meets the first requirement because the court has already granted him leave to proceed in forma pauperis under 28 U.S.C. § 1915(e)(1). However, plaintiff has not met the second requirement, because he has not shown that he has made any attempt to find a lawyer on his own. To satisfy this requirement, plaintiff must submit rejection letters from at least three lawyers who declined to represent him in this case. If he contacted three lawyers but did not receive any rejection letters, he may submit a declaration or affidavit identifying the lawyers he asked, the date he made his requests and the way in which each lawyer responded. Even if plaintiff had shown that he made reasonable efforts to find counsel on his own, I would deny plaintiff's motion because he has not shown that the case is too difficult for him to litigate on his own. Plaintiff's excessive force claim is relatively

straightforward in comparison to many claims filed by pro se litigants. Plaintiff was present during the incident and has personal knowledge of many of the relevant facts. Thus, this case will require much less discovery or investigation than many other cases and is not the type of case for which this court would generally recruit counsel. For these reasons, plaintiff's motion will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff Charles Deshawn Hall is GRANTED leave to proceed on claims that defendant Deputy Spears used excessive force against him and defendants Deputies McCarragher, Anderson and John Doe Deputies failed to intervene to prevent Spears from using excessive force.

2. Plaintiff is DENIED leave to proceed on all other claims.

3. Defendants John Doe Nurse, John Doe Doctor, United States Marshal Service, John Doe U.S. Marshals, Dane County Jail and John Doe Sheriff are DISMISSED.

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. The clerk's office will prepare summons and the U.S. Marshals Service shall affect service upon defendants.

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 is unable to locate him, his case may be dismissed for failure to prosecute.

8. Plaintiff's motion for assistance in recruiting counsel, dkt. #5, is DENIED.

Entered this 3d day of January, 2018.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge