IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN D. TIGGS, JR.; a.k.a. A'KINBO
JIHAD-SURU HASHIM,

Plaintiff,

v.

LINDA HODDY-TRIPP and
SECURITY CAPTAIN CALDWELL,

Defendants.

OPINION AND ORDER

01-C-171-C

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In this civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff John D. Tiggs, Jr., a/k/a A'Kinbo Jihad-Suru Hashim, alleges that defendants Linda Hoddy-Tripp and Security Captain Caldwell violated his Eighth Amendment right to be free from cruel and unusual punishment by spraying chemical incapacitating agents into his cell. Jurisdiction is present under 18 U.S.C. § 1331.

Presently before the court are defendants' and plaintiff's cross-motions for summary judgment. Because I find that a reasonable jury could not conclude that defendants administered the chemical agents to plaintiff's cell with excessive force or for the sole purpose of inflicting pain and suffering, defendants' motion for summary judgment will be

granted and plaintiff's motion for summary judgment will be denied.

From the facts proposed by the parties, I find the following material facts to be undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff John D. Tiggs, Jr., a/k/a Akinbo Jihad-Suru Hashim, is a Wisconsin prisoner incarcerated at the Supermax Correctional Institution. Plaintiff has a long history of assaultive, disruptive and non-compliant conduct in the prison setting. While in prison, plaintiff has been disciplined for assaulting a correctional officer.

Defendant Linda Hoddy-Tripp has been employed by the Wisconsin Department of Corrections as a corrections unit supervisor at Supermax since January 16, 2000. In this capacity, defendant Hoddy-Tripp's duties include, but are not limited to, overseeing the security, treatment and general living conditions of all inmates assigned to the unit. The unit manager is an administrator responsible for all activities that take place within the unit; the development, implementation and monitoring of overall institution goals, policies and procedures; and the direction of an institution-wide program. As unit manager, defendant Hoddy-Tripp is under the general supervision of the deputy warden. Defendant Hoddy-Tripp began her employment with the state of Wisconsin on October 15, 1990. Before

working at Supermax, defendant Hoddy-Tripp was employed at Columbia Correctional Institution as an officer, sergeant and inmate complaint investigator.

Defendant Carroll Caldwell has been employed by the Wisconsin Department of Corrections as a captain at Supermax since October 1999. As a captain at Supermax, defendant Caldwell's duties include, but are not limited to, the supervision of lieutenants, sergeants and correctional officers. In addition, defendant Caldwell assists the security director and the warden with the implementation of security policies and decisions. Defendant Caldwell has been employed by the State of Wisconsin since June 1988. Before coming to Supermax, defendant Caldwell was employed at Oakhill Correctional Institution as a lieutenant from August 1997 to October 1999.

B. Incident of June 29, 2000

On June 28, 2000, plaintiff was assigned to alpha unit cell #311. Supermax is made up of a number of wings that are referred to as units; alpha unit is the most secure unit.

In the early morning hours of June 29, 2000, plaintiff was issued a conduct report (#1113825) for covering his camera and cell windows with paper. The conduct report states that at 2:38 a.m., plaintiff was in possession of "altered property and some disallowed property (per Level One Handbook dated 062800)." (Plaintiff alleges that defendant Hoddy-Tripp enacted a set of alpha unit rules that prohibited certain types of inmate

property on June 28, 2000. Defendants allege that defendant Hoddy-Tripp did not enact a set of alpha unit rules but enforced the unit alpha handbook.) Plaintiff was placed on paper restriction, under which most papers are removed from an inmate's cell, other than papers relating to active court cases in which deadlines are pending within the next thirty days.

In the morning of June 29, 2000, approximately nine hours after plaintiff had allegedly obstructed the view into his cell, defendant Hoddy-Tripp went to plaintiff's cell and told him that he was being placed on paper restriction. Defendant Hoddy-Tripp gave plaintiff the option of passing out all of his papers, other than those relating to active court cases with deadlines pending within the next 30 days, or coming to the door to be restrained so that he could be moved to another cell while officers conducted a cell search to remove the papers. Plaintiff stated that defendant Hoddy-Tripp was not going to get her hands on his "legals." Plaintiff started pacing back and forth frantically in his cell between stacks of his legal papers. Plaintiff covered his windows with papers so staff could not monitor him. Defendant Hoddy-Tripp tried to obtain plaintiff's compliance with her order to come to the cell front to be restrained. Plaintiff remained uncooperative.

At 11:18 a.m., defendant Hoddy-Tripp asked defendant Caldwell to speak with plaintiff about why he needed to comply and to try to gain his compliance. Defendant Caldwell went to plaintiff's cell immediately, made her presence known and tried to begin

a dialogue. Caldwell told plaintiff that staff needed to remove him from his cell so that it could be searched and property could be removed in order to comply with the paper restriction. Plaintiff refused. Caldwell then gave plaintiff a direct order to come to the cell front to be restrained. Plaintiff refused again, saying, "No, you're not getting your hands on my legal work." Caldwell told plaintiff that a cell extraction team was suited up and that he would be removed from his cell if he did not comply.

Defendant Caldwell left plaintiff's cell and reported to the officer's station, where she instructed the unit staff that they were going to perform a cell extraction. Caldwell assigned the following people to the extraction team: officer Ewing as the team leader; sergeant Tom as "pad 1"; sergeant Spilski as "pad 2"; officer Sherman as the restraints person; and officer Bahlman as the videographer. At 11:20 a.m., as the extraction team was suiting up, Caldwell asked defendant Hoddy-Tripp whether she would talk to plaintiff to try to get him to comply with orders and to inform him about the legal work that he would be allowed to keep in his cell.

Defendant Hoddy-Tripp went to talk to plaintiff. She told him that she needed to see documentation of his pending court cases in order for him to keep the related papers in his cell under an alpha unit policy. Plaintiff showed her documentation in one case and then continued to argue with her over the rest of his legal property. Plaintiff quit looking for the documentation for other cases.

At 11:35 a.m., defendant Caldwell and the cell extraction team proceeded to plaintiff's cell front. At the time, defendant Hoddy-Tripp was still trying to convince plaintiff to comply with orders to be removed from his cell. Defendant Caldwell gave plaintiff another direct order to come to the cell front to be restrained. Plaintiff refused her directive and the cell extraction team was presented immediately as a show of force, meaning that the team showed themselves at the cell front so that plaintiff could see that they were suited up and ready to perform a cell extraction. When plaintiff saw the cell extraction team, he covered his cell door window with his mattress and covered his corridor window with either soap or toilet paper. Defendant Caldwell tried to speak with plaintiff again, but he would not answer her.

Caldwell assigned officer Gressman to stay at the cell while the extraction team and Caldwell reported to the officers' station, where she watched plaintiff's cell through a camera monitor. Caldwell observed that plaintiff was packing away all of his paperwork. Caldwell also observed plaintiff wrapping a sheet around his hands and for a short time he was crouched in the corner of his cell manipulating something with his hands. Caldwell could not tell whether plaintiff had a weapon with which he could harm himself or staff. (From Caldwell's point of view, it appeared as though plaintiff was preparing for battle.) In Caldwell's experience, it is not unheard of for an inmate to attack correctional staff with a weapon.

At approximately 11:40 a.m., defendant Caldwell contacted security director Parisi and told him about the situation with plaintiff. Because of plaintiff's behavior and the possibility of plaintiff's harming himself or staff, Caldwell believed that the use of force was necessary to gain plaintiff's compliance. Parisi concurred with Caldwell's assessment and authorized a use of force, including the use of incapacitating agents.

At 11:47 a.m., defendant Caldwell and the cell extraction team arrived at plaintiff's cell front again. Caldwell gave plaintiff a direct order to come to the cell front to be restrained and to remove his mattress and window covering. She told plaintiff that if he did not comply, she had authorization for the use of incapacitating agents and would use CN gas (Chloroaectophemone) if necessary.

At 11:48 a.m., officer Ewing opened the upper trap of plaintiff's cell door and defendant Caldwell administered a one-second burst of CN gas into plaintiff's cell. Plaintiff was sitting on the bunk in his cell with his face level with the trap door, which is approximately waist-high. The bunk is approximately three feet from the door. When the agent was administered, it hit plaintiff directly in the face. Plaintiff rose quickly and tried to push the canister away. Ewing shut the trap door to plaintiff's cell immediately and asked plaintiff whether he would comply with the order to be restrained. Plaintiff responded by saying something to the effect that the gas was not shit and that he made stronger gas. Plaintiff also said something to the effect that he wanted defendant Caldwell to come into

the cell and fight him one on one.

Defendant Caldwell told staff to keep plaintiff in the cell for a while because he was still being uncooperative and out of control. In Caldwell's opinion, it was more appropriate to leave plaintiff in his cell for a short period of time to allow him to settle down and cooperate rather than to administer additional incapacitating agents. Caldwell asked plaintiff such as whether he liked the chemical agents. (According to plaintiff, this statement was a taunt. According to Caldwell, she made the statement in an effort to show plaintiff that his continued refusal to cooperate was not the rational choice but, instead, was self-defeating.)

At 11:54 a.m., Ewing asked plaintiff to comply with the order to be restrained. After plaintiff responded that defendants should "come in and get him," Caldwell administered a partial burst of CN gas. Plaintiff had covered his upper trap door with his pillow and his lower trap door with his mattress. To Caldwell, it was clear that plaintiff was not willing to comply with orders.

At 11:59 a.m., Ewing informed plaintiff that if he did not comply, staff would administer CS (O-Chlorobenzyl) gas. When plaintiff refused to comply, officer Ewing opened the upper trap door to plaintiff's cell. Officer Sherman used a baton to push plaintiff's pillow into his cell and Caldwell applied a one-second burst of CS gas into the cell. Approximately one minute later, plaintiff was willing to comply with staff orders to be

restrained and removed from his cell.

Plaintiff spent a total of approximately ten minutes in his cell while the incapacitating agents were present. The ventilation to plaintiff's cell and the tier was turned off during this period. At Supermax, whenever chemical incapacitating agents are used, the ventilation system is shut off and the air exchange rate is set to exhaust in order to avoid contaminating other areas of the unit. On alpha unit, when the air in an inmate's cell is exhausted, fresh air from outdoors is brought into the cell and the displaced air is pushed into the hallway and then exhausted outdoors through an exhaust vent in the hallway.

When the cell extraction team began the procedure of extracting plaintiff from his cell, defendant Hoddy-Tripp went to the end of the range of cells where she could not see the vestibule and then left the range.

After plaintiff was restrained, he was escorted to the strip cage by officers Spilisk and Ewing. Caldwell asked plaintiff whether he would like a shower. Plaintiff replied, "Damn right I want a shower and while you're in here I want you to wash my back" in such a way that Caldwell believed plaintiff wanted her personally to wash his back. Plaintiff continued to be loud and disruptive during the escort to the strip cage.

Once placed in the strip cage, plaintiff spit at staff and was disrespectful to staff by saying things such as, "Get your ass out of my face, you are all a bunch of clowns." Caldwell asked plaintiff whether he needed medical attention, to which plaintiff responded, "Damn

right I want medical attention, you assaulted me." Plaintiff refused to be strip searched and continued to be disruptive. An officer in central control turned on the water in the strip cage, but plaintiff elected not to shower. Caldwell informed staff at Health Services that plaintiff wanted medical attention and was told that someone would go to the strip cage to attend to plaintiff. After plaintiff refused to submit to a strip search, he was left in the strip cage while the cell extraction team ate lunch and helped distribute lunch to the rest of the unit. Between 12:15 p.m. and 1:00 p.m., officer Gressman made periodic checks on plaintiff.

At approximately 1:00 p.m., defendant Caldwell and the cell extraction team returned to the strip cage, where Caldwell asked officer Cruzinger to try to get plaintiff to comply with a strip search. Plaintiff submitted to a strip search. During the escort to a different cell, plaintiff continued to be disruptive and disrespectful. The cell extraction team escorted plaintiff to a different cell where he was placed in control status without further incident.

On July 3, 2000, plaintiff reported to Dr. Riley, a Supermax physician, that he had been experiencing a burning sensation in his chest and coughing up a brown substance that plaintiff believed to be blood since exposure to the chemical agents. Plaintiff also had problems digesting his food.

C. Defendant Caldwell

Defendant Caldwell's education and training relating to her employment duties include, but are not limited to, training in the administration of chemical incapacitating agents, training in avoiding inmate assaults against correctional officers and employees, training in obtaining inmate compliance without physical confrontations and training in various provisions of the Wisconsin Administrative Code, including the provisions relating to the use of chemical incapacitating agents. Her training also includes review of the Department of Corrections and Supermax internal management procedures relating to security and intermediate weapons.

Consistent with her training, on June 28, 2000, defendant Caldwell first tried to obtain plaintiff's compliance by speaking to him, trying to engage plaintiff in a dialogue, giving him direct orders to comply and by displaying a show of force. Only after these steps did not convince plaintiff to agree to present his wrists to be restrained did Caldwell administer chemical agents into plaintiff's cell.

In Caldwell's opinion, the amount of CN and CS gas she used was the minimum amount necessary to obtain plaintiff's compliance. In her opinion, after an attempt to reason with an inmate has failed and after the inmate refuses to comply with one or more direct orders, using chemical agents to obtain compliance is more humane and effective and is less likely to result in injury to either staff or the inmate than a flesh-to-flesh confrontation.

According to Caldwell, she did not administer chemical agents to plaintiff's cell in order to cause plaintiff harm or to punish him, but in order to gain plaintiff's compliance. Caldwell does not see punishing inmates or causing them harm as an aspect of her role as a captain.

D. Plaintiff's Cell

Defendants' HVAC (heating, ventilation and air conditioning) expert witness, Donald Wheeler, is the HVAC specialist for Supermax. His job duties include monitoring and repairing heating, ventilation, air conditioning and refrigeration systems throughout the institution.

According to Wheeler's measurements, plaintiff's cell is 6 feet wide, 12 feet deep and 10 feet high, yielding a total volume of 720 cubic feet. The normal air exchange rate in plaintiff's cell is 72 cubic feet a minute. When the air exchange rate is set to exhaust, the air exchange rate is 120 cubic feet a minute.

Wheeler has read the instruction sheet for the CN and CS gases administered to plaintiff's cell on June 29, 2000. In his opinion, on the basis of the size of plaintiff's cell and the air exchange rate, the cell cannot be considered a "confined area" that would preclude the administration of CN or CS gas in a magnum fogger pattern. According to Wheeler, a "confined area" does not provide for air exchange.

E. Chemical Incapacitating Agents

Defendants' expert witness on the use of chemical incapacitating agents, Todd Sawinski, is the training captain for Supermax. His job duties as training captain include conducting and coordinating training on firearms, incapacitating agents and other control devices and procedures. He has applied incapacitating agents to inmates on numerous occasions. Sawinski is also a Principles of Subject Control instructor.

The "force option continuum" is a state-wide standard set by the State of Wisconsin's Law Enforcement Standards Board. Sawinski is very familiar with the continuum; he employs it in his job duties and it is taught in many classes. The continuum consists of five major components: presence; dialogue; empty hand control (pain compliance, distractions, stuns, creation of imbalance and handcuffs); intermediate weapons; and firearms. The components represent the escalating physical responses that may be used by an officer who is confronting a situation in which coercion must be employed. Each option is to be considered and rejected (but not necessarily used) before resorting to a higher level response.

In Sawinski's opinion, incapacitating agents are less likely to cause injuries to either inmates or staff and are more effective and humane than are applications of direct physical force, such as tackling the inmate or using a baton.

Sawinski has reviewed the videotape of plaintiff's cell extraction dated June 29, 2000, as well as defendant Caldwell's written statement relating to the cell extraction. He has also

reviewed documents provided by the manufacturer of the chemical incapacitating agents administered to plaintiff's cell, showing the chemical composition of the agents. It is Sawinski's opinion that defendant Caldwell followed the force option continuum and that the use of incapacitating agents and the amount used were justified for the following reasons: (1) staff spoke with plaintiff for a considerable period of time to try to generate voluntary compliance before using any force; (2) defendant Caldwell presented the cell extraction team as a show of force before using any incapacitating agents; (3) Caldwell's incident report details how plaintiff's behavior demonstrated his intent to escalate the situation by covering his door with a mattress, wrapping his hands and concealing his actions from the camera; (4) plaintiff was informed that incapacitating agents would be used before they were, giving plaintiff the opportunity to comply; (5) Caldwell saw that the CN gas was ineffective; and (6) plaintiff was asked on five separate occasions during the time of his exposure to the gases whether he was ready to come out of the cell. It is Sawinski's opinion that Caldwell's actions in administering the CN and CS agents were consistent with Principles of Subject Control training and the force option continuum.

Dave DuBay is defendants' expert witness on the composition of the chemical incapacitating agents administered to plaintiff. DuBay is the director of research at Defense Technology/Federal Laboratories, the manufacturer of the CN and CS agents administered in this case, where he has been employed since 1994.

DuBay has reviewed the formulation ingredients for the two MK-9 fogger units that were used to administer the CN and CS agents in this case. When dispensed from the MK-9 fogger unit, the CS and the CN agents have effective ranges of ten to twelve feet. According to their Material Safety Data Sheets under the heading "special protection measures," both agents list ventilation and local exhaust as control measures. The manufacturer's instructions state that handlers of the CS and CN agents should "never use [the gases] in confined areas. Use only with adequate air supply."

According to its Material Safety Data Sheet, the CS agent may cause irritation to lungs, stomach, digestive system, superficial keratitis and conjunctivitis. Inhalation of the CS gases and contact with the eyes or skin may cause a burning sensation and irritation. Ingestion of the agent can cause dizziness, nausea and a burning sensation. According to its Material Safety Data Sheet, a control measure for the CN agent is to "avoid skin contact."

In DuBay's opinion, the administration of two one-second bursts of CN mace and one one-second burst of CS mace to an inmate housed in a ventilated prison cell would cause temporary irritation and incapacitation but no permanent injury.

OPINION

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the

severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because the Eighth Amendment draws its meaning from evolving standards of decency in a maturing society, there is no fixed standard to determine when conditions are cruel and unusual. Id. at 346. Conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 108-09 (7th Cir. 1971) (no Eighth Amendment violation where inmate alleged cell was filthy and stunk, water faucet from which he drank was only inches above commode and there was inadequate ventilation).

To succeed on an Eighth Amendment claim, a plaintiff must satisfy both the objective and subjective elements of a two-part test. McNeil v. Lane, 16 F.3d 123, 124 (7th Cir. 1994). First, the plaintiff must show conditions of confinement objectively serious enough to be considered cruel and unusual. Id. Second, he must show from a subjective point of view that the defendant acted with a sufficiently culpable state of mind. Id.

Plaintiff contends that defendant Caldwell's spraying of mace against him, authorized by defendant Hoddy-Tripp, constituted the use of excessive force in violation of the Eighth Amendment. However, the Court of Appeals for the Seventh Circuit has held that it is appropriate to use mace when an inmate refuses to obey an order to submit to handcuffing so that he can be removed from his cell. Soto v. Dickey, 744 F.2d 1260, 1265-70 (7th Cir. 1984). As the court of appeals has explained, in a prison setting "[o]rders given must be

obeyed. Inmates cannot be permitted to decide which orders they will obey, and when they will obey them." Id. at 1267. However, the use of chemical agents does violate the Eighth Amendment if the agents are used "in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain." Id. at 1270.

The undisputed facts in this case reveal that defendants did not employ chemical agents until after plaintiff had refused repeatedly either to turn over the legal materials for which he did not have pending deadlines or to be handcuffed, after he had been warned that chemical agents would be used if he did not comply and after defendants followed the progressive steps of the force option continuum. The record also shows that plaintiff stated a desire for a one-on-one physical altercation with correctional staff, that defendant Caldwell believed that plaintiff might have had a weapon and that plaintiff has a history of assaultive behavior within the prison system. The record indicates also that defendant Caldwell administered one standard one-second burst of the CN agent, tried to get plaintiff's compliance, administered a second partial burst, tried to get plaintiff's compliance and only then administered a one-second burst of the stronger CS agent. Defendant Caldwell gave plaintiff the opportunity to comply between each administration and stopped as soon as plaintiff agreed to be restrained. Plaintiff was escorted to the strip cell almost immediately where he had the opportunity to take a shower to wash off the mace (which he refused) and health services staff was called to examine plaintiff. Under these conditions, "[t]he use of

mace . . . does not constitute cruel and inhuman punishment." Id.

Plaintiff argues that defendants' shutting off the ventilation to his cell before the chemical agents were administered brought the administration out of compliance with the manufacturer's instructions (which note that the agents should not be used in a confined space) and into the purview of the Eighth Amendment. However, plaintiff overlooks a key undisputed fact: at the same time staff turned off the ventilation, they turned on the exhaust system. It is standard practice for prison staff to turn off the ventilation system so that chemical agents are not inadvertently spread to other cells in the area and to turn on the exhaust system so that fresh air is brought in from the outside, pushing displaced air into the hallway and back outside through an exhaust fan. When the system is set to exhaust, the air exchange is greater than under normal ventilation operation. In Wheeler's opinion, plaintiff's cell cannot be considered a confined space because of this air exchange. Thus, the agents were not administered to a confined space in contravention of the manufacturer's instructions as plaintiff contends.

The fact that defendants could have employed a less forceful alternative does not alter the conclusion that the use of the incapacitating agents did not violate plaintiff's Eighth Amendment rights. The decision to employ chemical agents instead of physically removing plaintiff from his cell is the type of determination prison officials must be free to make if they are to fulfill their paramount responsibility of insuring the safety of guards and inmates.

Id. at 1269-70; see also Hewitt v. Helms, 459 U.S. 460, 473 (1983) ("[S]afety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration."). This deference to prison officials' judgment is especially appropriate here in light of plaintiff's history of assaultive and disruptive conduct. In addition, in Sawinski's and defendant Caldwell's opinions, the use of chemical agents is less likely to result in physical harm to inmates and staff than physical confrontation. Courts should intervene only when there is "substantial evidence to indicate [that] such officials have exaggerated their response to these considerations." Id. at 1269. In this case, there is no evidence that defendants' actions were an exaggerated response to the situation before them. The fact that plaintiff's injuries (coughing up a brown substance and having digestive problems for ten days) are not more extensive supports the conclusion that defendants' conduct was not malicious or sadistic or intended to cause harm. See Lansford v. Bennett, 17 F.3d 1574, 1582 (7th Cir. 1994) (degree of injury is relevant to determining extremeness of force used).

Plaintiff relies heavily on the allegation that defendants did not have the authority to demand his legal materials because the demand was made pursuant to an alpha unit rule that was not consistent with the Wisconsin Administrative Code. Therefore, according to plaintiff, he was justified in refusing to turn over the legal materials and to be restrained. Plaintiff's argument is misplaced. Even if defendants were not following state administrative regulations, this does not mean that they violated the Eighth Amendment. The underlying

reason for plaintiff's refusal to obey orders is not relevant to the inquiry whether defendants used excessive force in applying the agents. The undisputed facts reveal that plaintiff refused to obey defendants' orders on several occasions and over a period of approximately half an hour. Plaintiff was warned that if he did not comply, chemical agents would be used. If plaintiff believed that the policy of restricting his legal materials was not proper, the appropriate route for challenging the policy would have been by filing an inmate complaint, not by refusing to turn over the papers.

Plaintiff also contends that defendants' use of incapacitating agents was not consistent with Wisconsin Administrative Code provisions outlining the use of chemical agents. Plaintiff's argument fails for two reasons. Most important, a state law violation is not tantamount to a constitutional violation. Even if defendants had violated the Wisconsin Administrative Code, this conclusion would support only a state law claim, not a claim of constitutional dimensions. As discussed above, the use of incapacitating agents under circumstances such as those present in this case does not violate the Eighth Amendment.

Plaintiff's argument also fails on the merits because defendants' actions were not inconsistent with the code. At the time of the incident, Wis. Admin. Code § DOC 306.08 stated in relevant part:

> (2) Regulation. The use of a chemical agent is a form of non-deadly force and is regulated by this section.

. . .

(4) Nonemergency Situations.

(a) To deal with situations other than [emergencies], chemical agents may only be used where c. DOC 306.06(3) permits the use of force and, unless par. (c) applies, the inmate physically threatens to use immediate physical force, which may involve a threat to use a weapon, against the staff member. Unless par. (c) applies, an inmate's verbal threats do not justify using chemical agents.

. . .

(c) When s. DOC 306.06(3) permits the use of force and a staff member knows of an inmate's history of violent behavior in similar situations while in custody and reasonably believes that the inmate will become violent in this situation, a chemical agent may be used after the [force option continuum] procedures . . . have been followed but before the inmate physically threatens to use physical force.

(d) Chemical agents may not be used in nonemergency situations if:

1. It is clear that the chemical agents would have no physical effect on the inmate; or

2. An inmate refuses to follow an order and the use of chemical agents is not otherwise justified under par. (a) or (c).

At the time of the incident, Wis. Admin. Code § DOC 306.06(3) stated:

(3) Non-deadly force may be used by correctional staff against inmates only if the user of force reasonably believes it is immediately necessary to realize one of the following purposes:

. . .

(f) To change the location of an inmate;

. . .

(h) To enforce a departmental rule, a posted policy or procedure or an order of a staff member.

The undisputed facts indicate that plaintiff refused to comply with a direct order to

either turn over his legal materials or to be restrained, expressed a desire for physical confrontation, appeared to have a weapon, has a history of assaultive behavior and that defendants employed the force option continuum before applying the chemical agents. Applying these facts to the Wis. Admin. Code, defendants used the non-deadly force of chemical agents to change plaintiff's location and enforce an order in a nonemergency situation under circumstances in which defendants knew of plaintiff's violent behavior in similar situations. Defendants did not violate Wis. Admin. Code §§ DOC 306.08(4) or 306.06(3) in administering chemical agents to plaintiff's cell.

Construing the facts in the light most favorable to plaintiff, I find that a reasonable jury could not conclude that defendants administered the chemical agents to plaintiff's cell with excessive force or for the sole purpose of inflicting pain and suffering. Accordingly, I will grant summary judgment to defendants on plaintiff's claim that they violated his rights under the Eighth Amendment and will deny plaintiff's motion for summary judgment.

Because I find that defendants did not subject plaintiff to excessive force in violation of the Eighth Amendment by their use of incapacitating agents, I need not discuss defendants' arguments that defendants are protected by qualified immunity.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Linda

Hoddy-Tripp and Security Captain Caldwell is GRANTED. Plaintiff John D. Tiggs, Jr., a/k/a A'Kinbo Jihad-Suru Hashim's motion for summary judgment is DENIED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 14th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge