IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHNNY BRAMLETT,
Inmate #00251579,

Plaintiff,

OPINION AND ORDER

v.

01-C-193-C

RICHARD WESTOVER,
Correctional Officer,

Defendant.

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In this civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983, plaintiff Johnny Bramlett contends that defendant Richard Westover violated his rights under the Eighth Amendment and was negligent by waiting several minutes before intervening in an assault against him. Jurisdiction is present under 28 U.S.C. § 1331.

On December 31, 2001, defendant filed a motion for summary judgment in this case. According to the schedule for briefing dispositive motions set out in the magistrate judge's preliminary pretrial conference order dated August 30, 2001, plaintiff had until January 21, 2002, in which to oppose the motion. On January 6, 2002, plaintiff filed a request for an enlargement of 90 days' time in which to oppose the motion. The magistrate judge denied

plaintiff's request in an order dated January 10, 2002. However, the magistrate judge did allow plaintiff an extension of 10 days, until January 31, 2002, in which to oppose the motion. Plaintiff did not oppose the motion by the deadline. Because plaintiff is representing himself in this case and therefore might not have been aware that if he failed to file a brief in opposition to defendant's motion for summary judgment, the court would proceed to decide the motion on its own without his submission, on its own motion the court granted plaintiff an additional three weeks, until February 22, 2002, in which to oppose defendant's motion for summary judgment. In that order dated February 13, 2002, plaintiff was advised that if he failed to oppose defendant's motion, the court would accept as true all unopposed facts proposed by defendant and would decide defendant's motion on the basis of those facts. That deadline has passed and plaintiff has not opposed the motion.

Presently before the court is defendant's unopposed motion for summary judgment. Because I find that a reasonable jury could not find that defendant acted with deliberate indifference to plaintiff's safety and because plaintiff failed to file a notice of claim within 120 days of the incident, I will grant defendant's motion for summary judgment.

For the purpose of deciding this motion, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

At all times relevant to this case, plaintiff Johnny Bramlett was incarcerated at the Fox Lake Correctional Institution, a medium security adult male correctional institution located in Fox Lake, Wisconsin. Defendant Richard Westover was a sergeant at the institution. In his capacity as sergeant, defendant was under the supervision of the lieutenant or captain and was responsible for the security, custody, control and treatment of inmates at Fox Lake. Defendant had total responsibility for post operations in a particular area or on an assigned shift and performed other related work as needed.

On August 29, 2000, at noon during lunch time, defendant was working in housing unit 2-C sorting the first class mail in the unit office. Defendant looked up and saw several inmates standing in the main hallway by the D-wing doorway. When defendant stood up, he saw two inmates fighting in the D-wing dayroom. Defendant identified the inmates as plaintiff and Michael Lewis. Defendant saw Lewis hitting plaintiff with a mop wringer in the head and upper body area. Defendant ran out of his office, hit his body alarm and told the control center that a fight was taking place in the D-wing dayroom. Right away defendant told the inmates to stop fighting, but they ignored the order. Defendant ordered all inmates who had gathered in the area of D-wing to move into C-wing and then closed the C-wing door. Defendant ordered the remaining inmates to go outside. Because it was lunch time, there were many inmates in the area passing to and from the cafeteria. There might

have been as many as 90 inmates in the area at any one time during the incident.

Before defendant could deal with the two fighting inmates, he first had to secure the area around them and make sure that no other inmates could enter into the fight or hinder him in any way from breaking up the fight. It is standard operating procedure to secure the area for security reasons and for the safety of both inmates and staff. Defendant was the only officer in the area at this time. Department of Corrections officers are trained not to intervene when inmates are fighting until other officers arrive to assist for security and safety reasons.

Defendant then ordered plaintiff and inmate Lewis to stop fighting a second time. Lewis continued to hit plaintiff with the mop wringer. Plaintiff grabbed a chair from the day room and held it up in front of him to protect himself from the wringer. Defendant never saw plaintiff show any aggression toward Lewis.

Defendant ordered plaintiff and inmate Lewis to stop fighting a third time. They continued fighting. Defendant then radioed the control center again, reporting that the fight was still in progress and that he would need some help to deal with the situation. Defendant then ordered plaintiff and Lewis to stop fighting a fourth time. Lewis refused to put down the mop wringer. Plaintiff was still defending himself with the chair.

At this point, plaintiff dropped the chair and went into the bathroom. Defendant then ordered Lewis several more times to put down the mop wringer; Lewis refused. Finally,

Lewis looked directly at defendant, who ordered Lewis to drop the wringer a final time. This time Lewis acknowledged defendant's order and put down the wringer. Defendant ordered Lewis into the center hall.

Captain Goggins and several officers arrived on the unit and took Lewis down the hall. Defendant went into the bathroom to get plaintiff and take him into his office. Both plaintiff and inmate Lewis were placed in temporary lock up. Defendant issued Lewis a conduct report for battery. On September 7, 2000, Lewis was found guilty of the battery charge. Plaintiff was not charged with any Department of Corrections violations for his involvement in the fight because defendant never saw him show any aggression toward Lewis.

Defendant did not delay in his actions to break up the fight. He did not intend to harm plaintiff through any of his actions. Defendant acted quickly, followed standard operating procedures to secure the unit and proceeded to break up the fight between plaintiff and Lewis.

Plaintiff did not file a notice of claim with the Attorney General for the State of Wisconsin within 120 days of the event giving rise to his claim.

OPINION

A. Eighth Amendment: Failure to Protect

Plaintiff contends that defendant failed to protect him in violation of the Eighth Amendment by not intervening in the assault more quickly. The Eighth and Fourteenth Amendments give prisoners a right to remain safe from assaults by other inmates. Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996). "'[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" Farmer v. Brennan, 511 U.S. 825 (1994). "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' see Hudson v. Palmer, 468 U.S. 517, 526 (1984), having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer, 511 U.S. at 833.

In a case alleging a defendant's failure to protect a prisoner from harm, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively pos[e] a substantial risk of serious harm." Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996) (citation omitted). The inmate also must prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." Langston, 100 F.3d at 1237 (citing Haley v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be assaulted and failing to take reasonable protective measures. Farmer, 511 U.S. at 847. The prison official must be aware of facts from which the

inference could be drawn that a substantial risk of serious harm exists and the official must draw that inference. Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. See id. at 208. In failure to protect cases, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

In this case, plaintiff alleges that defendant knew that he was being attacked but allowed the attack to continue for several minutes before intervening, effectively condoning the violence. However, the undisputed facts indicate that defendant left the security booth as soon as he saw the fight, ordered plaintiff and Lewis to stop fighting as soon as he arrived on the scene, cleared the area of other inmates when plaintiff and Lewis would not stop fighting, called for additional help and gave several additional orders for plaintiff and Lewis to stop fighting. The undisputed facts also show that it is standard procedure to secure the area in which a fight is taking place for security and safety reasons. In addition, officers are trained not to intervene when inmates are fighting until other officers arrive to assist; defendant was the only officer in the unit at the time the fight broke out. Although it is unfortunate that plaintiff was the recipient of inmate Lewis's aggression, the facts indicate that defendant was taking steps to break up the altercation while keeping safety and security

precautions in mind. Taking the facts in the light most favorable to plaintiff, the undisputed facts do not suggest that defendant failed to take reasonable measures to protect plaintiff from harm. See Farmer, 511 U.S. at 847. On the basis of these facts, I find that a reasonable jury could not conclude that defendant acted with deliberate indifference to plaintiff's safety or that he "effectively condon[ed] the attack by allowing it to happen." Langston, 100 F.3d at 1237. Defendant's motion for summary judgment as to this claim will be granted.

B. Negligence

Plaintiff alleges that defendant was negligent under state law for not stopping the assault more quickly. In Wisconsin, the elements of a negligence claim are: "(1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." Antwaun A. v. Heritage Mutual Insurance Co., 228 Wis. 2d 44, 55, 596 N.W.2d 456 (1999).

Defendant argues that because plaintiff failed to file a notice of claim with the Attorney General for the State of Wisconsin within 120 days after the event giving rise to the claim, his state law negligence claim must be dismissed. Wis. Stat. § 893.82(3) provides that

> no civil action or civil proceeding may be brought against any state . . . employe . . . on account of any act . . . committed in the course of the discharge of the . . . employe's duties . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action . . . , the claimant in the action or proceeding serves upon the attorney general written notice of a claim . . . .

It is undisputed that plaintiff did not file a notice of claim with the Attorney General within 120 days of the fight. The failure to comply with § 893.82(3) requires the dismissal of a state law claim filed in federal court. Saldivar v. Cadena, 622 F. Supp. 949, 959 (W.D. Wis. 1985). Therefore, plaintiff's state law claim of negligence must be dismissed. Defendant's motion for summary judgment as to this claim will be granted.

ORDER

IT IS ORDERED that defendant Richard Westover's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 13th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge