IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSHUA A. ANEY,

Plaintiff,

v.

CAPT. GILBERG, in his official and individual capacities; C/O D. ESSER, in his official and individual capacities; SGT. HOTTENSTEIN, in his official and individual capacities; THOMAS BROWN, SHAWN GALLINGER, JAMES BOISEN, CHAD WINGER and TIMOTHY NORDENGREN,

Defendants.

OPINION AND ORDER

02-C-131-C

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This is a civil suit for declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983 by plaintiff Joshua Aney. At all relevant times, plaintiff was incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Plaintiff is proceeding on a claim that on September 16, 2001, defendants Gilberg, Esser, Hottenstein, Brown, Gallinger, Boisen, Winger and Nordengren used excessive force when they extracted him from his cell in violation of his Eighth Amendment rights.

The case is before the court on defendants' motion for summary judgment. Defendants argue that defendants Esser, Hottenstein and Nordengren lacked the requisite personal involvement to be liable under § 1983 and no reasonable jury could find in favor of plaintiff on his claim that defendants used excessive force against him.

I conclude that all defendants are entitled to summary judgment because no jury could conclude from the evidence that the force applied to plaintiff was malicious or sadistic and intended to cause plaintiff harm rather than a good faith effort to maintain or restore order and discipline.

From the facts proposed by the parties and the videotape of the incident, I find that the following material facts are not in dispute. (I note that although plaintiff disputed many of defendants' proposed facts in his brief, he failed to propose his version of the facts and cite to evidence in his response to their proposed findings. Under this court's procedures, a copy of which was provided to the parties with the preliminary pretrial conference order, the court disregards facts presented in a brief and conclude that a proposed fact is undisputed if the opposing party does not dispute fact in its response to the other party's proposed findings of fact. Procedures, II.C.)

UNDISPUTED FACTS

Plaintiff Joshua A. Aney was incarcerated at the Wisconsin Secure Program Facility

in Boscobel, Wisconsin from August 2, 2001, to May 9, 2002. On September 16, 2001, when the incident giving rise to plaintiff's claim occurred, defendant Timothy Gilberg was a supervising officer at the facility, defendants Bart Hottenstein, Dane Esser, Shawn Gallinger, Chad Winger, Thomas Brown and Timothy Nordengren were correctional officers and defendant James Boisen was a correctional sergeant.

On September 16, 2001, defendant Esser came to plaintiff's cell to pick up plaintiff's meal tray. Esser asked Aney to respond to him verbally. Plaintiff refused. Esser notified defendant Hottenstein of the situation and Hottenstein went to plaintiff's cell and asked plaintiff to respond to him verbally. Plaintiff did not respond. Hottenstein then called defendant Gilberg, who reported to the unit, spoke with staff and went to plaintiff's cell front. Gilberg saw Aney sitting in the far corner of his cell. Gilberg ordered Aney to respond to him verbally. Aney did not respond. Gilberg called the security director and requested and received authorization to conduct a cell extraction of Aney, including the use of incapacitating agents, if necessary. Gilberg ordered defendants Boisen, Winger, Gallinger and Brown to suit up for a cell extraction. He directed officer Nordengren to videotape the extraction. Gilberg performed the role of supervisor in charge. He briefed the team as to the goals of the procedure and instructed them to move plaintiff out of his cell so that the team could perform a search of his cell as well as a strip-search of Aney.

Gilberg then gave plaintiff an order to come to the cell door to be restrained. Aney

refused to move. Gilberg informed plaintiff that if he continued to ignore his orders, he would perform a cell extraction. Gallinger also gave plaintiff an order to come to the cell door to be restrained but plaintiff continued to refuse to respond. The team opened plaintiff's cell door entered the cell. Plaintiff was sitting in the corner. The team forced him onto his stomach and applied restraints to his ankles and wrists. Boisen and Winger applied compliance holds to plaintiff's wrists. A compliance hold involves pressing the inmate's hands or wrists together for 1 or 2 seconds. Under prison policy, such a hold may be used when an inmate become disruptive or non-compliant. The team placed restraints on plaintiff's ankles and wrists and directed him to stand up. During this movement, Boisen and Winger forcefully lifted Aney by his handcuffs, raising his arms to his shoulder, which caused severe pain to Aney's shoulders, arms and back. Gallinger secured plaintiff's head and Boisen, Winger and Gallinger escorted him backwards out of his cell and into the hallway. The purpose of securing an inmate's head is primarily to regain control of the situation. It is not to cause pain or injury. The head is secured when officers move behind the inmate and place their dominant hand over the eyes of the inmate while their opposite hand secures the inmate's chin. The officer then brings the inmate's head to the officer's chest in order to hold the inmate in place. This temporarily impedes the inmate's sight and balance, thereby making it more difficult for him to display certain types of disruptive behavior, such as spitting and biting. In addition, when the officer holds the inmate's head

close to the officer's chest, he can attempt to communicate with the inmate in an effort to de-escalate the situation and reduce the need for further use of force.

After plaintiff's property was removed from his cell, he was directed back into his cell and the restraints were removed. Plaintiff sang and laughed sarcastically at times during the incident.

After he was put back into his cell, plaintiff was observed pacing back and forth. Gallinger asked plaintiff whether he had any medical injuries to report. Plaintiff refused to respond. A nurse was called in to assess plaintiff's condition. She noted no injury or concerns. However, for several days a large scrape and swelling on plaintiff's hip caused him pain when he walked and his arms and shoulders were sore from having been pulled up by his handcuffs while his arms were behind his back.

Plaintiff did not submit any health request related to any of his injuries or pain. According to the program handbook given to every inmate transferred into the institution, an inmate who requires non-emergency medical attention must complete a health request and place it outside his cell door for pick-up. Plaintiff never informed unit staff of any medical concerns related to his injuries. Plaintiff did discuss the cell extraction with the psychiatrist and psychologist from whom he was receiving mental health treatment.

DISPUTED FACTS

The parties dispute whether plaintiff's cell extraction was precipitated by a need to recover broken pieces of an inhaler in plaintiff's cell. Defendants contend that they observed broken pieces of an inhaler in the cell before plaintiff was taken out. Plaintiff denies that the inhaler was broken. I conclude that this dispute is immaterial. The facts reveal that plaintiff was repeatedly non-compliant with orders to respond verbally and physically. His sustained non-compliance with orders to talk or move provided ample justification for defendants to enter his cell and perform a cell extraction.

OPINION

Summary judgment is appropriate when, after both parties have had the opportunity to submit evidence in support of their respective positions and the court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

The Eighth Amendment to the United States Constitution, as applied to the states

through the Fourteenth Amendment, prohibits a state from inflicting cruel and unusual punishment upon inmates. In cases involving the claimed use of excessive force, "the core inquiry is ... whether force was applied in a good-faith effort to maintain or restore order and discipline, or maliciously and sadistically to cause harm." Hudson v. McMillan, 503 U.S. 1, 7 (1992); Kinney v. Indiana Youth Center, 950 F.2d 462, 465 (7th Cir. 1991). In determining whether the force used was "malicious and sadistic," a court must consider the need for the application of force, the relationship between the need and the amount of force used, the threat reasonably perceived by the responsible official, and any efforts made to temper the severity of a forceful response. Id. Information about the severity of the inmate's injury is relevant to the resolution of the claim, but the absence of allegations of serious injury is not conclusive. Id. Even de minimis force can violate the Eighth Amendment's prohibition against cruel and unusual punishment but not every malevolent touch gives rise to a federal cause of action. Id. at 9.

The first issue is whether any force was necessary. In this case, plaintiff's repeated noncompliance with the officers' orders necessitated a certain measure of force to maintain order and discipline. The court of appeals has rejected the view that the Eighth Amendment prohibits the use of physical force as a means of responding to noncompliance. See Soto v. Dickey, 744 F.2d 1260, 1267 (7th Cir. 1985). When plaintiff failed to respond to separate requests for a verbal response from defendants Esser, Hottenstein and Gilberg, Gilberg

received authorization from the security director to perform a cell extraction. Plaintiff continued to ignore orders from Gilberg and Gallinger to come to the cell door, even though he was warned that he would be extracted from the cell if he did not respond. These undisputed facts do not show that the requests or orders were unreasonable or that defendants initiated the extraction out of malice or for the purpose of harming plaintiff.

The second question is whether the amount of force used was properly related to the need and the threat perceived by the responsible official. Plaintiff argues that the force used was not justified because he was sitting in the corner of the cell without resistance. He contends further that the force was excessive because "slow and deliberate" as opposed to "dynamic" cell extraction should have been sufficient. However, as defendants argue, the type of entry has no effect on how the rest of the cell extraction is performed. Plaintiff may not have been physically resisting prison officials when they entered his cell, but his refusal to respond to orders shows that he was engaged in a power struggle. There is always an unpredictable risk of physical resistence when prison officials deal with non-responding and potentially combative inmates. The Supreme Court has held that prison officials should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Hudson, 503 U.S. at 6.

Plaintiff contends that defendants made no effort to temper the severity of a forceful

response to his behavior. He argues that given his history of mental illness and his frequent visit to a psychologist and a psychiatrist at the facility, defendants should have contacted a psychologist to speak with him before performing the extraction. Plaintiff refers to the internal management procedures on use of force, which provides in relevant parts:

> VI. NON-EMERGENCY SITUATIONS
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> If the situation allows for a "planned use of force" ... , the following steps shall be taken if feasible:
>
> B. Ask one or more available people to communicate with the inmate, such as an officer, a social worker a crisis intervention worker, a member of the clergy, or a psychologist or psychiatrist;

In this case, different officers asked plaintiff three separate times for a verbal response and gave two orders to come to the cell door. Although additional participation by a psychiatrist might have been desirable, defendants' failure to summon mental health staff to plaintiff's cell does not render the cell extraction an excessive use of force.

As a result of defendants' actions, plaintiff suffered a large scrape and swelling on his hip, which caused him pain for several days when he walked. He also suffered severe pain at the time defendants pulled him to a standing position, and his shoulders and arms were sore. However, I am not persuaded that the act of forcefully pulling up on plaintiff's handcuffs to bring him to a standing position amounts to excessive force, particularly when plaintiff has not provided evidence that he suffered any residual adverse effects on his health

beyond temporary soreness. The amount and severity of the pain plaintiff experienced during the cell extraction is inevitable when prison officials are forced to physically move an inmate who is resistive to orders from his cell. This de minimis use of force is not repugnant to the conscience of humanity and does not violate the Eighth Amendment. See Hudson, 503 U.S. at 9-10; Outlaw v. Newkirk, 259 F.3d 833, 839 (7th Cir. 2001) (swelling and bruising on inmate's hand after guard slammed it in a cuffport hatch considered de minimis).

In summary, because no reasonable jury could conclude that plaintiff was subjected to the use of excessive force in violation of the Eighth Amendment, I will grant defendant's motion for summary judgment. Because I am granting judgment to defendants on the merits of plaintiff's claim, there is no need to decide whether defendants Esser, Hottenstein and Nordengren are entitled to judgment in their favor on the ground that they were not personally involved in the claimed wrongdoing.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Gilberg, Esser, Hottenstein, Brown, Gallinger, Boisen, Winger and Nordengren is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 19th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge