IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

TERRELL THOMAS,

Plaintiff,

v.

JON E. LITSCHER, CHARLES BLANCHETT, PERSEY PITZER, MICHAEL HOLMS, MR. ADAMS, STEPHANIE DAVIS, CAROLYN McGRAW, MR. CRAFT, MR. LUMPKIN and JOHN DOE,

Defendants.

OPINION AND ORDER

00-C-464-C

- -

This is a proposed civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Terrell Thomas is presently confined at the Supermaximum Correctional Institution in Boscobel, Wisconsin but was confined at the Corrections Corporation of America - Whiteville Correctional Facility in Tennessee at all times relevant to the proposed complaint. Plaintiff has paid the full fee for filing his complaint. However, because he is a prisoner and defendants are "employee[s] of a governmental entity," this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary

relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A(a), (b). Subject matter jurisdiction is present. See 28 U.S.C. § 1331.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). In his proposed complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

At all times relevant to this complaint, plaintiff Terrell Thomas was incarcerated at Whiteville Correctional Facility. Defendant Jon Litscher is the Secretary of the Wisconsin Department of Corrections and is responsible for all functions related to out-of-state contracts. Defendant Charles Blanchett is the president and CEO of Corrections Corporation of America, which owns and operates Whiteville Correctional Facility. Defendant Persey Pitzer is the warden of Whiteville Correctional Facility and is responsible for reviewing all disciplinary appeals and for the care and custody of all inmates at the facility. Defendant Michael Holms is the assistant warden at Whiteville. Defendant Adams is the assistant chief of security at Whiteville and is responsible for the confinement of inmates in segregation. Defendant Stephanie Davis is the designated major disciplinary hearing officer and is responsible for

holding all major disciplinary hearings at Whiteville. Defendant John Doe is a correctional officer at Whiteville. Defendants Carolyn McGraw, Mr. Craft and Mr. Lumpkin are staff members who sit on the program review committee at Whiteville.

B. Riot

On November 30, 1999, there was a riot in the dining area at Whiteville Correctional Facility. At the time the events erupted, plaintiff was eating lunch with his assigned living unit. Fearful that the rioting participants might assault him, plaintiff entered a refrigerator cooler at the rear of the kitchen and locked the door. Along with other inmates, he remained there for approximately one hour. At that time, an unidentified S.O.R.T. team staff member dressed in riot gear approached the cooler door and ordered the inmate closest to the door to unlock it. The inmate complied willingly and plaintiff and the other inmates indicated their cooperation by raising their hands in the air. When the door was opened, defendant Holms emptied a canister of chemical agents into the cooler and closed the door. Plaintiff attempted to lessen the intense effects of the chemicals by covering his airways but his efforts were to no avail. After what seemed like several minutes of choking and coughing, an unidentified member of the S.O.R.T. team opened the door and ordered plaintiff to crawl through debris and chemical agents. While plaintiff was crawling, defendant John Doe kicked him in various parts of his

body and bruised his legs and arms.

When plaintiff reached the hallway, he was handcuffed and escorted to the segregation unit, where he was left lying in the middle of the floor, barely able to breathe and completely unable to see for approximately eight hours. Still suffering from the chemical agents, plaintiff was escorted by members of the S.O.R.T. team to another segregation unit, unit IC, and forced into a two-man cell with three other inmates. At that time, plaintiff and his cellmates were stripped of all clothing and left completely naked and humiliated for approximately fifteen hours. After fifteen hours, plaintiff was issued only one pair of boxer shorts underwear so big that plaintiff had to tie them just to keep them from falling. Air conditioning was running full blast in the month of December; the extremely cold room combined with the long periods of exposure to chemical agents caused plaintiff to suffer many sleepless nights and headaches. Plaintiff was subject to these conditions for over twenty days. For over seven days, plaintiff was denied a shower to rinse off the chemicals to which he was exposed during the disturbance.

Plaintiff was not examined by medical staff to treat his bruises, headaches and shock. Plaintiff made numerous written requests to be seen by medical staff and made a specific verbal request to defendant Adams concerning his frequent headaches and itchy skin.

While plaintiff was in segregation, he was interviewed by defendant Adams about the participants in and purpose of the November 30 disturbance. Plaintiff told defendant Adams

where he had been during the disturbance, that he had no involvement in the disturbance and that he was experiencing medical problems for which he had not received medical attention. Defendant Adams ignored plaintiff's medical problems and ordered the S.O.R.T. team to return plaintiff to the cruel conditions in the segregation unit. Defendant Litscher had knowledge that Wisconsin inmates at Whiteville and at other CCA facilities had claimed to be abused by the S.O.R.T. teams. Defendant Blanchett organizes and authorizes the use of these abusive S.O.R.T. teams and permits their use at all of the CCA facilities.

C. Disciplinary and Reclassification Hearings

On December 20, 1999, plaintiff was given a major disciplinary report alleging violations of CCA rules #15-2.13 (Insurrection), #15-2.7 (Detaining) and #15-2.12 (Hindering). Also on December 20, 1999, plaintiff was advised of his rights, pleaded not guilty to the charges, waived the right to twenty-four hour notice of the charges and requested a full formal due process hearing. On December 22, 1999, defendant Davis conducted a major disciplinary hearing on the charges. Defendant Davis refused to hear any defense offered by plaintiff, tell plaintiff the substance of any confidential testimony or acknowledge the existence of any statements against plaintiff. Defendant Davis stated the reason for her finding of guilt and imposition of penalty as "due to disciplinary." The only documentation defendant Davis

provided at the disciplinary hearing was the investigation form written by defendant Lumpkin stating "this report is true, factual and stands as written." On December 30, 1999, plaintiff appealed the disciplinary action to defendant Pitzer, outlining the violations of due process. Defendant Pitzer did not acknowledge the appeal.

On January 12, 2000, without prior notice, plaintiff was escorted to the hallway for a program review committee hearing headed by defendant McGraw for the purposes of reclassification and transfer. Defendant McGraw informed plaintiff that he had been recommended to the program review committee by security for consideration for transfer to the Supermaximum Correctional Institution as a result of the disciplinary actions. Three of the four staff members who were to decide whether plaintiff should be reclassified and transferred to the segregated confinement of the Supermaximum Correctional Institution were defendants McGraw, Lumpkin and Craft. Defendant McGraw's husband, a unit manager at Whiteville, was severely assaulted during the November 30 disturbance in which plaintiff was accused of participating and which was the focus of the program review committee headed by defendant McGraw. Defendant Lumpkin had conducted the investigation of plaintiff's disciplinary report and accepted the report as true. Defendant Craft was also assaulted during the November 30 disturbance. Plaintiff was recommended for reclassification and transfer by this partial program review committee.

Approximately one hour after the program review committee hearing on January 12, 2000, plaintiff was escorted to a transport vehicle and taken against his will across state lines to the Supermaximum Correctional Institution. This reclassification and transfer was not approved by the appropriate Wisconsin Department of Corrections officials until January 17, 2000, five days after defendants McGraw and Pitzer ordered a private company to transfer plaintiff from Tennessee to Wisconsin.

OPINION

A. State Actor Requirement

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that he was deprived of a constitutional right and that a person acting under color of state law deprived him of such right. See Gomez v. Toledo, 446 U.S. 635, 640 (1980). Several defendants in this action are employees of Corrections Corporation of America, which is a private enterprise. This fact might suggest that all of plaintiff's claims could be dismissed summarily for failure to meet the state actor requirement. However, courts have determined that defendant Corrections Corporation of America and its employees are "state actors" under § 1983. See Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996) (firm operating prison is state actor because firm performed "traditional state function" of operating a prison); Giron v.

Corrections Corp. of America, 14 F. Supp.2d 1245, 1249 (D.N.M. 1998) (privately employed correction officer is state actor because he performed state function of incarcerating citizen). In light of these rulings, it would be inappropriate to dismiss plaintiff's claims on this ground.

B. Venue and Jurisdiction

According to plaintiff's allegations, many or all of the acts giving rise to his claims took place outside this jurisdiction. Moreover, it appears from his allegations that several defendants are not residents of the state of Wisconsin or otherwise subject to jurisdiction in this court. But because defects in venue and personal jurisdiction can be waived, it is appropriate to consider the substance of the claims in plaintiff's proposed complaint.

C. Eighth Amendment

1. Excessive force

Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) To determine whether force was used appropriately, a court considers factual allegations as to the safety threat perceived by the

officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. See Whitley v. Albers, 475 U.S. 312, 321 (1986). See also Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984):

> [I]t is a violation of the Eighth Amendment for prison officials to use mace or other chemical agents in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain. . . . The use of mace, tear gas or other chemical agent of the like nature when reasonably necessary to prevent riots or escape or to subdue recalcitrant prisoners does not constitute cruel and inhuman punishment, and this is so whether the inmate is locked in his prison cell or is in handcuffs. . . . [T]he use of nondangerous quantities of the substance in order to prevent a perceived future danger does not violate 'evolving standards of decency' or constitute an 'unnecessary and wanton infliction of pain.'

(Internal citations omitted).

In this case, plaintiff alleges that excessive force was used against him while prison officials were attempting to quell a prison riot. Because the disturbance team was attempting to subdue a riot, it may have been constitutional for them to use more force than would be appropriate in a less volatile situation. However, plaintiff has alleged that defendant Holms emptied a canister of chemical agents into the cooler where plaintiff remained during the riot and closed the door and that defendant John Doe kicked him, sprayed him with chemical agents and forced him to crawl through debris. I conclude from these allegations that plaintiff has stated a claim upon which relief may be granted with respect to his claim that defendants

Holms and John Doe used excessive force against him. However, as discussed below, plaintiff may not proceed on this claim because he has failed to submit proof that he exhausted his administrative remedies on the claim.

2. Conditions of confinement

In order to state a claim under the Eighth Amendment, plaintiff's allegations about prison conditions must satisfy a test that involves both a subjective and objective component. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). The objective component focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579. In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference "'implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'" Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)).

The Eighth Amendment imposes a duty on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. See Dixon, 114 F.3d at 642. In order to violate the Eighth Amendment, deprivations must be "unquestioned and serious" and contrary to "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). This includes a right to protection from extreme cold. See Dixon, 114 F.3d at 642 (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment).

"[C]ourts should examine several factors in assessing claims based on low cell temperature, such as the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." See Dixon, 114 F.3d at 644. "Cold temperatures need not imminently threaten inmates' health to violate the Eighth Amendment." See id. Plaintiff's allegations that he was kept in an extremely cold cell with only boxers to wear for twenty days, denied a shower for seven days after crawling through debris and being sprayed with chemical agents and forced to sleep with three other men in a two-person cell are sufficient to state a claim under the Eighth Amendment. However, because plaintiff has not submitted proof that he has exhausted his administrative remedies on his claim that he was subject to unconstitutional conditions of confinement, he will not be allowed to

proceed on that claim.

3. Inadequate medical care

To state a claim of cruel and unusual punishment arising from the lack of medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. Detella, 95 F.3d 586, 590-91 (7th Cir. 1996). To be deliberately indifferent a prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). It is not enough that he "should have known" of the risk. Rather, the official must know there is a risk and consciously disregard it. See Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999).

Inmates have serious medical needs within the meaning of Estelle if they are suffering from medical conditions generally considered as life-threatening or as carrying risks of permanent, serious impairment if left untreated. Even if inmates are not facing death or permanent harm, prison officials violate the Eighth Amendment if the failure to provide medical

care constitutes a "denial of the minimal civilized measure of life's necessities," Farmer, 511 U.S. at 834 (1994), or "an unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 105. Assuming that plaintiff did have a serious medical need and that defendant Adams was deliberately indifferent to that need, plaintiff has failed to exhaust his available administrative remedies on that claim.

4. Failure to protect

Because plaintiff is proceeding pro se, I must construe his complaint liberally. Plaintiff contends that defendants Litscher and Blanchett, high officials in the Wisconsin correctional system and the Corrections Corporation of America Whiteville facility, are liable to him for knowingly "having placed [him] in a position of serious danger to be physically and mentally abused by ferocious and brutal S.O.R.T. teams." Although it is not entirely clear from plaintiff's allegations, it appears that he is premising this claim on a belief that defendants knew or should have known that disturbance teams in the Tennessee facility were trained pursuant to a policy to use excessive force in controlling inmates. Alternatively, plaintiff may be contending that the particular disturbance team that used excessive force against him had been involved previously in other incidents in which the team had been abusive to prisoners, that defendants knew of those incidents and that they nevertheless failed to take corrective action

so as to protect plaintiff from similar mistreatment. Although plaintiff has an uphill battle in obtaining evidence to prove such a claim, I cannot say at this early stage of the proceedings that plaintiff could prove no set of facts entitling him to relief. However, plaintiff's failure to exhaust his administrative remedies with respect to this claim requires dismissal of the claim.

5. Administrative exhaustion

Plaintiff has failed to submit proof that he exhausted his administrative remedies on any of his Eighth Amendment claims. The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim

on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The Seventh Circuit has adopted an expansive reading of the applicability of § 1997e(a), stating "if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733. Further emphasizing the importance of exhausting administrative remedies before filing suit, the court of appeals has made clear that "[t]here is no futility exception to § 1997e(a)," Perez, 182 F.3d at 537; see also Massey, 196 F.3d at 733, and that a prisoner's request for monetary damages that are unavailable under the administrative complaint system does not allow a prisoner to avoid 42 U.S.C. § 1997e's exhaustion requirement. See Perez, 182 F.3d at 537-38; see Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (discussing circuit split on whether prisoner needs to exhaust when seeking money damages not available through prison grievance procedure).

All of the reasons for requiring administrative exhaustion are present in plaintiff's case. Bringing his claims to the attention of prison authorities would have enabled them to investigate his allegations of Eighth Amendment violations, thus giving them the first

opportunity to scrutinize any constitutional violations. At the least, filing a claim might have helped to narrow the dispute or to develop the factual record. And finally, allowing the complaint system to work without judicial intervention would encourage development of an effective system. See Perez, 182 F.3d at 537-38; see also Nyhuis, 204 F.3d at 74.

Plaintiff has presented proof that he filed an administrative grievance with the Wisconsin Department of Corrections, complaining of a procedural due process violation. However, he has failed to submit proof that he exhausted his administrative remedies on his Eighth Amendment claims against any of the defendants. The Seventh Circuit has held that "courts merely need to ask whether the institution has an internal administrative grievance procedure by which prisoners can lodge complaints about prison conditions. If such an administrative process is in place, then § 1997e(a) requires inmates to exhaust those procedures before bringing a prison conditions claim." Perez, 196 F.3d at 734. Even if there was no effective remedy available to plaintiff on his Eighth Amendment claims through the Wisconsin administrative grievance system, § 1997e(a) requires "that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

D. Due Process

Plaintiff alleges that his rights under the due process clause of the Fourteenth

Amendment were violated by defendants' failure at his disciplinary hearing to allow him to present a defense and by defendants' failure to tell plaintiff the substance of any confidential testimony or statements against him. Plaintiff also alleges that the program review committee was not impartial.

Plaintiff fails to state a claim upon which relief may be granted. Plaintiff's allegations do not establish that he was deprived of a protectible liberty interest. A procedural due process violation against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Plaintiff alleges that he was recommended for reclassification and transferred to the Supermaximum prison. "A prisoner has no due process right to be housed in any particular facility" and even a transfer to a prison with a more restrictive environment does not implicate his due process rights because the prisoner could have been placed in the more restricted institution initially. Whitford v. Boglino, 63 F.3d 527, 532 (7th Cir. 1995). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protectible liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence.

See Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty).

Because plaintiff has no liberty interest that has been violated, he has no right to due process before being reclassified to Supermaximum Correctional Institution. Plaintiff has failed to state a claim upon which relief may be granted against defendants Davis, McGraw, Lumpkin and Craft.

ORDER

IT IS ORDERED that this action is DISMISSED

1) pursuant to 28 U.S.C. § 1915A(b)(2) as to plaintiff's claim under the Fourteenth Amendment against defendants Mr. Adams, Stephanie Davis, Carolyn McGraw, Mr. Lumpkin and William Craft for plaintiff's failure to state a claim upon which relief may be granted; and

2) pursuant to 42 U.S.C. § 1997e(a) as to plaintiff's Eighth Amendment claims against defendants Jon E. Litscher, Charles Blanchett, Persey Pitzer, Michael Holms for plaintiff's failure to exhaust his administrative remedies.

28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon

which relief may be granted . . . ." Because failure to exhaust is not one of the enumerated grounds, a strike will not be recorded against plaintiff under § 1915(g).

Entered this 21st day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge