IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS SCHROEDER,

Plaintiff,

v.

TONY GOTH,
MARK THOMPSON and
JON RYAN PETERSON,

Defendants.

OPINION AND ORDER

03-C-0299-C

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In this civil action for monetary and declaratory relief, plaintiff Thomas Schroeder, a Wisconsin inmate currently incarcerated at the Northfork Correctional Facility in Sayre, Oklahoma, contends that defendants Tony Goth, Mark Thompson and Jon Ryan Peterson violated the Eighth Amendment when defendant Thompson used excessive force against him and defendants Goth and Peterson failed to intervene while plaintiff was incarcerated at the Rock County jail in Rock County, Wisconsin. Presently before the court is defendants' motion for summary judgment in which they argue that (1) plaintiff failed to provide them with thirty days' written notice before filing this lawsuit, in violation of a consent decree to which he was bound; (2) plaintiff's claim should be barred under the doctrine of laches

because he waited three years and eight months to bring it; (3) plaintiff has failed to show that the force defendant Thompson used against him was excessive under the circumstances; and (4) defendants are entitled to qualified immunity.[1] Jurisdiction is present. 28 U.S.C. § 1331.

Defendants' motion will be denied. Defendants' first argument is premised on a consent decree that had already been terminated at the time plaintiff filed his complaint. Defendants' laches argument is unavailing also. Plaintiff did not delay unreasonably. He brought this claim over a year before the statute of limitations would have run and the only prejudice defendants allege is that they did not receive the thirty-day notice required under the consent decree. Although the consent decree would have been binding had plaintiff filed his claim shortly after the incident, the termination of the consent decree was not caused by plaintiff's delay. Finally, defendants are not entitled to summary judgment on the merits or on qualified immunity grounds. Plaintiff has submitted admissible evidence that defendant Thompson grabbed him by the throat and punched him in the eye. Defendants have not shown that either act was taken in a good faith effort to maintain discipline and order. It

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[1] In addition, defendants have filed a motion to amend their conclusions of law. This motion will be denied as unnecessary. This court no longer requires parties moving for summary judgment to submit proposed conclusions of laws. See Procedure to be Followed on Motions for Summary Judgment, I.A. attached to Pretrial Conference Order, dkt. # 10 (motion should be accompanied by supporting brief, statement of proposed findings of fact and evidentiary materials).

is well established in this circuit that needlessly punching an inmate may give rise to an excessive force claim.

I note that in responding to defendants' motion, plaintiff submitted a brief in opposition, an affidavit and a statement of factual matters he believes to be in dispute. Ordinarily, "[a]ll facts necessary to sustain a party's position on a motion for summary judgment must be explicitly proposed as findings of fact." Helpful Tips for Filing a Summary judgment Motion in Cases Assigned to Barbara B. Crabb, #1. However, in this case, I will allow plaintiff's affidavit to serve as his proposal of fact. One of the primary functions of this requirement is to distill pertinent evidence from a frequently voluminous record. In this case, the only admissible evidence plaintiff has submitted is this single affidavit. (Plaintiff attached a number of photocopied documents to his opposition brief. However, these documents are inadmissible because they do not meet the authentication requirement of Fed. R. Evid. 901. This rule prohibits courts from considering documents as evidence unless there is some evidence showing that the document is what its proponent claims it to be. Typically, this authentication requirement may be accomplished by attaching documents to an affidavit in which a party swears that the documents are true and correct copies of the originals. See Fed. R. Evid. 901(b)(1).) Moreover, defendants have treated plaintiff's affidavit as a statement of factual proposals, identifying those individual paragraphs they do not dispute and their reasons for disputing the remainder. Dfts.' Resp.

to Plt.'s PFOF, dkt. #53. Thus, treating plaintiff's affidavit as a statement of factual proposals in this case will not prejudice either side.

In addition, I note that defendants object to a number of the statements plaintiff makes on the ground that he has failed to cite to any evidence in the record. Dfts.' Resp. to Plt.'s PFOF, ¶¶ 8-15, 17, 24-28, dkt. #53. However, plaintiff signed the document, affirming under penalty of perjury that its contents are true and correct. Thus, plaintiff does not need to submit additional evidence to prove anything about which he is competent to testify. 28 U.S.C. § 1746. From the parties' proposed finding of facts, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Thomas Schroeder is a Wisconsin inmate currently incarcerated at the Northfork Correctional Facility in Sayre, Oklahoma. On November 15, 1999, the date of the incidents giving rise to this action, plaintiff was incarcerated at the Rock County jail in Rock County, Wisconsin, on a probation hold for jumping bail. During the booking process, plaintiff disclosed that he was Hepatitis C positive.

On November 15, 1999, staff at the Rock County jail decided to conduct a shakedown inspection of several cells after discovering that a piece of metal plating had been removed from a locking mechanism on one of the cell doors. Plaintiff's upper-level cell was

one of the cells searched. During the search, plaintiff threw or kicked a book out of his cell, beyond the upper-tier catwalk and to the lower level. Jail staff decided to take plaintiff to the booking room where disciplinary charges would be brought against him. Defendant Thompson handcuffed plaintiff and led him out of the cell without incident. Plaintiff became angry when defendants Thompson and Peterson carried him by his arms down the stairs and he began to resist physically. Defendant Thompson grabbed plaintiff by the throat, punched him in the eye and pinned him on the floor by placing his knee in the middle of plaintiff's back. Plaintiff's mouth began to bleed and he had difficulty breathing. Plaintiff resisted by kicking and cursing. At one point, he spat on several correction officers. Defendant Thomas and six other correction officers carried plaintiff to the booking room and placed him in a restraint chair. To prevent plaintiff from spitting, they placed a rag in his mouth and a helmet with a face shield on his head. Defendants Goth and Peterson witnessed all this, but did not intervene.

Plaintiff was released from the restraint chair slightly over four hours later. After he was released, he asked for medical treatment. At the duty nurse's recommendation, plaintiff was taken for examination to Mercy Hospital in Janesville, Wisconsin, where the medical staff found contusions on his right eye and left hand and a strained left shoulder. Plaintiff's injuries were neither life-threatening nor likely to result in permanent impairment. Upon returning to the jail, plaintiff asked corrections officer K. Davis what plaintiff would need

to do to press charges.

OPINION

A. Solles Consent Decree

Defendants argue that they are entitled to summary judgment because plaintiff failed to first provide them with thirty day's written notice as required by a consent decree entered in Solles v. Devine, 73-C-143 (W.D. Wis. July 5, 1978), amended, Solles v. Devine, 73-C-143 (W.D. Wis. Nov. 20, 1986). The decree was agreed to on behalf of a certified class of present and future inmates of the Rock County jail. It prohibits Rock County jail staff from "us[ing] physical force against a prisoner except to prevent escape, in self-defense, to protect another person, to prevent self-harm, to prevent serious destruction of property or upon refusal to obey a reasonable order to move from a particular area . . . ." In the event that a party believes that the consent decree has been breached, the party must notify the other parties in writing of the incident it deems to be a violation and must refrain from seeking supplemental or corrective relief for thirty days following the notice. The party notified of the alleged violation must have an opportunity to satisfy the aggrieved party and take corrective action. Defendants contend that they are entitled to summary judgment because plaintiff failed to comply with the consent decree's notice period.

Plaintiff argues that he was not aware that the Solles Consent Decree existed because

defendants failed to comply with the decree's mandate that they post the decree in conspicuous locations throughout the jail. Plaintiff's alleged lack of knowledge of the decree does not relieve him of the obligations of the decree. A party may be bound to the terms of a consent decree even when he does not know about them. See, e.g., Cagle v. Sutherland, 334 F.3d 980, 985 (11th Cir. 2003) (sheriff and county commissioner bound as successors in interest to terms of consent decree even though unaware of its existence); N.L.R.B. v. Ironworkers Local, 433 169 F.3d 1217, 1222 (9th Cir. 1999) ("Union may be found to be in contempt of the consent decree even if no individual associated with the Union was aware of it."). See also McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949) ("An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.")

Although a party may be bound by the terms of a consent decree even when he does not know about them, he is not bound by them after the decree has been terminated. Section 3626(b)(2) of the Prison Litigation Reform Act provides that "a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation." In January 2002, the original defendants in the Solles action moved to have the consent decree terminated pursuant to §

3626(b)(2). Solles, 73-C-143, dkt. # 71. In an order entered April 15, 2002, I ordered that the prospective relief set out in the consent decree be terminated. Solles, 73-C-143, dkt. #75. Neither party has addressed the effect of this termination order in their briefs. Nonetheless, I cannot enforce a provision that is no longer legally binding.

Defendants could have argued that the termination order has no bearing in this case because the relevant acts took place before it was entered. However, the thirty-day notice requirement does not place an obligation on inmates at the time of the alleged violation; it mandates action thirty days before a party seeks relief for the breach. The consent decree was terminated more than thirty days before plaintiff filed this suit.

B. Exhaustion of Administrative Remedies

Although plaintiff is not barred from pursuing his claim by the notice requirement in the consent decree, the Prison Litigation Reform Act requires inmates to exhaust their administrative remedies before suing over prison conditions. 42 U.S.C. § 1997e(a). However, an inmate "must exhaust only those administrative remedies that are available to him." Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002). See also Booth v. Churner, 532 U.S. 532 U.S. 731, 733-34 (2001) (Prison Litigation Reform Act mandates exhaustion of "administrative remedies . . . available"). Defendants argue that plaintiff failed to exhaust his administrative remedies. In making this argument, defendants equate the thirty-day

notice period to an "administrative remedy . . . available." Even if I were to assume that a notice requirement that does not mandate some form of responsive action qualifies as an "administrative remedy," cf. Wis. Admin. Code §§ DOC 310.12 (Wisconsin state prison inmate complaint system requires reviewing authority to dismiss, affirm or remand grievance to inmate complaint examiner within ten days), the thirty-day notice period was no longer "available" to plaintiff by virtue of the termination order.

Moreover, an administrative procedure is "available" only where prison officials have "authority to take some action in response to a complaint," even if it does not provide for the specific type of relief sought. Booth v. Churner, 532 U.S. 731, 736 (2001) (inmate grievance system was "administrative remedy . . . available" even though only relief sought was monetary and system did not provide for such relief); Larkin v. Galloway, 266 F.3d 718, 723 (7th Cir. 2001). Although the notice provision indicates that "the other party or parties shall have an opportunity to satisfy the aggrieved party and take corrective action" during the notice period, this clause does not authorize any form of relief; it merely provides a time frame in which a party who could be subject to a lawsuit may attempt to resolve an inmate's complaint. Cf. Wis. Admin. Code § DOC 310.15 (affirmed complaints must be implemented within thirty days of affirmation). Accordingly, the notice provision does not constitute an "administrative remedy . . . available."

Plaintiff notes in his brief that he filed a notice of claim pursuant to Wis. Stat. §

893.80 and an offender complaint pursuant to Wis. Admin Code § DOC 310. Although defendants observe correctly that these filings do not satisfy the exhaustion requirement because "neither is part of the Rock County jail grievance procedure," Dfts.' br., dkt. #51, at 3, they do not identify any other administrative procedures that were available at the jail, id.; dfts.' br., dkt. # 31, at 9-10. It may be that plaintiff failed to exhaust other available administrative remedies. However, by not developing this argument meaningfully, defendants have waived it. Central States, Southeast and Southwest Areas Pension Fund, 181 F.3d at 808 ("Arguments not developed in any meaningful way are waived."). Accordingly, defendants are not entitled to summary judgment under 42 U.S.C. § 1997e(a).

C. Laches

"[L]aches serves to protect defendants from prejudice caused by stale evidence, prolonged uncertainty about legal rights and status, and unlimited exposure to liability damages." Smith v. Caterpillar, Inc., 338 F.3d 730, 733 (7th Cir. 2003). To prevail on a claim of laches, the party asserting it must show unreasonable delay by his opponent in commencing the action, knowledge and acquiescence in the course of events and prejudiced resulting from the delay. Paterson v. Paterson, 73 Wis. 2d 150, 242 N.W.2d 907 (1976); Stein v. State Psychology Examining Bd., 2003 WI App. 147, ¶ 10, 265 Wis. 2d 781, 788-89, 668 N.W.2d 112, 113.

Generally, courts regard laches as an equitable substitute for a statute of limitations. Smith, 338 F.3d at 733. But see Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix, 283 F.3d 877, 881 (7th Cir. 2002) ("defense of laches is equally available in suits at law"). "Courts must obtain the statute of limitations in § 1983 cases from state law." Herman v. City of Chicago, 870 F.2d 400, 402 (7th Cir. 1989), citing 42 U.S.C.§ 1988. In Wisconsin, § 1983 actions have a six-year statute of limitation. See Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997). In analogizing laches to the statute of limitations applicable in § 1983 actions, I cannot find that plaintiff's three-year, eight-month delay was unreasonable. The defense of laches operates as a "bar upon the right to maintain an action by those who unduly slumber upon their rights." In re Estate of Flejter, 2001 WI App. 26, ¶ 41, 240 Wis. 2d 401, 421, 623 N.W.2d 552, 562. A litigant who brings an action years before the expiration of the statute of limitations cannot be said to be "unduly slumbering" on his rights.

Although the normal statute of limitations may provide some guidance on the issue of what constitutes a reasonable delay, laches terminates the right to sue when the regular period is too long under the particular circumstances. Smith v. City of Chicago, 769 F.2d 408 (1985). See also Farries v. Stanadyne/Chicago Division, 832 F.2d 374, 378 (7th Cir. 1987) (distinguishing laches from statutes of limitation in sense that laches defense is based on change in circumstances and not time). Defendants do not argue that they have been

prejudiced by the delay. Instead, they claim that "they have been irreparably denied the benefit of the bargain to which they were entitled under the Solles Consent Decree, namely that before such a suit was brought . . . the plaintiff should first notify the parties of the breach of the consent decree and attempt an informal and expedited resolution of the controversy." Dfts.' Br., dkt. #31, at 8-9.

Defendants' argument has some intuitive merit in the sense that the consent decree would have governed the action and defendants would have been entitled to thirty days' notice had plaintiff brought his claim shortly after the alleged incident. However, the termination of the consent decree was not plaintiff's doing. McDonald v. McDonald, 53 Wis. 2d 371, 381, 192 N.W.2d 903, 909 (1972) (prejudice to defendant must be result of plaintiff's delay). Plaintiff had no reason to anticipate that the law governing the parties' relationship would change if he delayed bringing his claim. The types of prejudice courts have found to entitle defendants to protection under the doctrine of laches are those that a plaintiff could have foreseen reasonably as resulting from his delay. See, e.g., Smith, 338 F.3d at 733 ("stale evidence, prolonged uncertainty about legal rights and status, and unlimited exposure to liability damages"); Batchelor v. Batchelor, 213 Wis. 2d 251, 259, 570 N.W.2d 568, 571 (Ct. App. 1997) (parties' motion to disqualify opposing party's counsel denied under doctrine of laches where lawyer had already performed extensive work on case and moving party knew of conflict month prior to bringing motion). It is a mere

fortuity that the consent decree was terminated between the time of the alleged incident and the filing of plaintiff's complaint.

Moreover, defendants reaped a corollary benefit as a result of the intervening termination order. In terminating the prospective relief provided by the termination order, I found that the terms of the Solles consent decree provided inmates with more rights than necessary to correct violations of their federal rights; thus, the termination order limits the scope of defendants' potential liability. In pursuing his claim under the Eighth Amendment, rather than under the consent decree, plaintiff must prove that force was used against him in a manner repugnant to mankind. Fillmore v. Page, 358 F.3d 496, 504 (7th Cir. 2004) ("quantum of force required for a constitutional violation is that which is 'repugnant to the conscience of mankind.'") (quoting Hudson v. McMillian, 503 U.S. 1, 10 (1992)). Had he been proceeding on a claim for contempt, plaintiff could have succeeded by showing simply that some of the force applied against him was not in response to his failure to respond to a reasonable demand.

Under these circumstances, plaintiff's claim is not barred under the doctrine of laches. Defendants have not shown that plaintiff's delay in pursuing his claim for three years and eight months was unreasonable where plaintiff had reason to believe he had six years to bring his action. Moreover, defendants have not shown that they were materially prejudiced or disadvantaged by plaintiff's delay.

D. Merits

The central question in any Eighth Amendment excessive force claim is "'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Filmore, 358 F.3d at 503 (quoting Hudson, 503 U.S. at 6) (additional citations omitted). "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated . . . whether or not significant injury is evident." Hudson, 503 U.S. at 9 (citations omitted). However, not every malevolent touch by a prison guard gives rise to a claim under the Eighth Amendment; *de minimus* uses of force are not actionable. Hudson, 503 U.S. at 9-10. To determine whether force was used appropriately, a court considers the need for the application of force, the relationship between that need and the amount of force used and the extent of the injury inflicted. Whitley v. Albers, 475 U.S. 312, 321 (1986). Also relevant are factors such as the extent of the safety threat, as reasonably perceived by the officers, and the efforts made by the officers to mitigate the severity of force. Id. A plaintiff need not show that the excessive force was part of ongoing policy rather than an isolated and unauthorized event. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).

First, it is undisputed that plaintiff violated jail rules and physically resisted being taken to a booking room. Plaintiff kicked or threw a book out of his cell in violation of prison rules and he kicked, cursed and spat at the officers escorting him to the booking

room. Under these circumstances, the application of at least some force to restrain plaintiff was warranted. Soto v. Dickey, 744 F.2d 1260, 1267 (7th Cir. 1984) (physical force warranted in responding to inmate noncompliance).

Although officers were entitled to use some force to insure compliance with their directives and jail rules, they were entitled to apply force only in proportion to these objectives. Certainly, under the facts of this case, defendants were permitted to physically carry plaintiff to the booking room and place him in a restraint chair. In addition, placing a helmet on plaintiff's head was a reasonable means of preventing him from continuing to spit at officers. However, plaintiff has testified that defendant Thompson grabbed him by the throat and punched him in the eye in addition to these other acts. See Schroder Aff., dkt. # 50 ¶ 11. Defendants do not attempt to explain why grabbing plaintiff by the throat and punching him in the eye was necessary to restrain him, particularly when he was already handcuffed. In Thomas v. Stalter, 20 F.3d 298, 302 (7th Cir. 1994), several officers told an inmate that he was to submit to a blood test. The inmate refused, so the officers forced him onto a gurney, held him down, punched him in the face and told him to shut up. Id. These facts were sufficient to permit a reasonable jury to find that the officer had acted maliciously and sadistically to cause harm. The facts in this case are similar. A reasonable jury could find that grabbing plaintiff by the neck and punching him in the eye was not part of a good faith effort to maintain and restore discipline.

Finally, it is undisputed that plaintiff incurred contusions on his eye as a result of the incident, an injury for which the jail nurse recommended that he be examined at a local hospital. Defendants argue that the injuries plaintiff sustained were not "particularly severe." Dfts.' Br., dkt. #31, at 12. They note that the injuries "were not likely to result in permanent impairment, required no diagnosis rendered on the same day at Mercy Hospital and for two or three days thereafter, required no off-site treatment." Id. However, Hudson does not require that the injury an inmate suffer be serious; the only requirement is that the injury not be *de minimus*. Thomas, 20 F.3d at 302 (citing Hudson, 503 U.S. at 9-10 for proposition that bruises, loosened teeth and cracked dental plate can form basis of excessive force claim). Viewing the evidence in the light most favorable to plaintiff, I conclude that plaintiff could persuade a reasonable jury that defendant Thompson maliciously and sadistically caused plaintiff harm and that the resulting injuries were more than minimal.

Under § 1983, a plaintiff may establish liability not only against those prison guards actually applying excessive force, but also against "officers who have a realistic opportunity to step forward and prevent a fellow officer from violating a plaintiff's rights through the use of excessive force but fail to do so." Miller v. Smith, 220 F.3d 491, 495 (7th Cir. 2000). However, plaintiff has not shown that defendants Goth and Peterson had a realistic opportunity to prevent this single blow. There is no evidence that either could or should have foreseen that defendant Thompson might punch plaintiff. Once the punch was thrown,

there was nothing further to prevent. Accordingly, defendants' motion for summary judgment will be granted with respect to defendants Goth and Peterson.

D. Qualified Immunity

Defendants argue in the alternative that even if defendant Thompson used excessive force, he is entitled to qualified immunity from civil damages. Qualified immunity is due when an officer could have believed reasonably that his conduct was constitutional in light of the clearly established law and the information the officer possessed at the time the incident occurred. Saucier v. Katz, 533 U.S. 194 (2001). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Hope v. Pelzer, 122 S.Ct. 2508, 2515 (2002) (quoting Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985)). This requires consideration of the specific context of the case. Saucier, 533 U.S. at 201. A plaintiff may show that a right is clearly established by pointing to "closely analogous cases establishing that the conduct is unlawful, or demonstrate that the violation is so obvious that a reasonable state actor would know that what he [or she] is doing violates the Constitution." Morrell v. Mock, 270 F.3d 1090, 1100 (7th Cir. 2001). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the

unlawfulness must be apparent." Hope, 536 U. S. at 739 (quoting Anderson, 483 U.S. at 640).

Defendant Thompson is not entitled to qualified immunity if plaintiff can prove the facts he alleges because they would support an Eighth Amendment claim under the law clearly established by Hudson, 503 U.S. at 10 and Thomas, 20 F.3d 298. Those cases made clear that striking an inmate when it is unnecessary as a means of control can be cruel and unusual punishment. Therefore, defendants' motion for summary judgment will be denied with respect to plaintiff's Eighth Amendment claim against defendant Thompson.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants Tony Goth, Mark Thompson and Jon Ryan Peterson on plaintiff Thomas Schroeder's claim that they violated his rights under the Eighth Amendment by subjecting him to excessive force is DENIED with respect to defendant Thompson and GRANTED with respect to defendants Goth and Peterson;

2. Defendants' motion for leave to amend their conclusions of law is DENIED as unnecessary.

Entered this 28th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge