IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREDERICK ROGERS,

Petitioner, OPINION AND ORDER

v. 04-C-979-C

C.O. GREGG A. SCHUEFFNER,

Respondent.

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In this civil action for declaratory, injunctive and monetary relief, plaintiff Frederick Rogers contends that defendant Gregg Schueffner used excessive force against him in violation of the Eighth Amendment on April 28, 2003, when he pulled on a tether around plaintiff's right hand and injured plaintiff's finger, wrist and upper forearm. Jurisdiction is present. 28 U.S.C. § 1331. This case is before the court on cross motions for summary judgment. Also, plaintiff filed a motion to strike defendant's reply brief. Defendant's motion for summary judgment will be granted because plaintiff has not adduced any evidence from which a reasonable jury could find that defendants used excessive force against him and caused him injury.

With respect to the motion to strike, plaintiff contends that defendant's reply brief

contains contradictory facts and therefore should be stricken. Fed. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are not favored and usually will be denied unless the allegations are not related to the controversy and may cause prejudice to one of the parties. 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure Civil 2d § 1382, at 683-90 (1990). (Citations omitted.) Plaintiff's disagreement with facts discussed in defendant's brief is not a ground to strike the brief. Plaintiff had the opportunity to oppose defendant's proposed findings of fact and file a response brief. Therefore, plaintiff's motion to strike defendant's reply brief will be denied.

In determining the material and undisputed facts, I disregarded those proposed findings of fact and responses that constituted legal conclusions, were argumentive or irrelevant, were not supported by the cited evidence or were not supported by citations specific enough to alert the court to the source for the proposal. In particular, I note that plaintiff attempted to dispute key facts proposed by defendant but failed to cite to specific evidence in the record to support his position. For example, many of plaintiff's objections consisted of the following: "Dispute. See Rogers' motion for s/j in its entirety." This response fails to comply with this court's instructions for putting facts into dispute by citing to specific evidence in the record. Plaintiff's citation to his "motion for s/j in its entirety" does not constitute a reference to specific evidence. In every instance where plaintiff failed

to cite to specific evidence in the record, I was required to disregard his objection and accept defendant's proposed fact as true. From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

FACTS

Plaintiff Frederick Rogers is an inmate at Fox Lake Correctional Institution in Fox Lake, Wisconsin. Defendant Gregg A. Schueffner is a correctional officer at Racine Correctional Institution in Sturtevant, Wisconsin.

Plaintiff was an inmate at Racine Correctional Institution on April 28, 2003, when the events leading up to this lawsuit transpired. That day, defendant worked a shift beginning at 2:30 p.m. on the Waukesha West Unit, where plaintiff's cell was located. The staff log for April 28 on the Waukesha West Unit had the following entry written in just prior to 2:30 p.m.: "Per Capt. Howard I/M Rogers, Frederick is on teather [sic]."

Around 4:50 p.m. on April 28, 2003, defendant and correctional officer Mlodzik went to plaintiff's cell to give him certain medications. Before handing plaintiff anything, defendant put plaintiff on a tether strap, which is a leather strap approximately two feet in length with handcuffs attached on both ends. One handcuff is placed on an inmate's wrist and the other handcuff is attached to the outside of the cell door. The inmate can then be given items through the trap in the cell door while at the same time the inmate's movements

can be controlled because he is attached to the tether.

Defendant placed the handcuff from the tether on plaintiff's right wrist and double-locked the handcuff before distributing any medications to him. Defendant then placed one pill of MS Contin on plaintiff's right hand. Next, defendant gave plaintiff an albuterol inhaler. Defendant placed the inhaler in plaintiff's right hand and directed him to keep the inhaler in his right hand and take only two puffs. Plaintiff complied and returned the inhaler. Defendant then handed plaintiff a bottle of clindamycin phosphate topical solution and directed plaintiff to use the product with his right hand and then return the bottle. After plaintiff applied the solution to his neck and face he did not return the bottle to defendant. Instead, plaintiff re-applied the solution to his neck and face. After applying the second coat of the solution plaintiff returned the bottle to defendant.

Last, defendant handed plaintiff a pocket peak device. This is a device used to measure breathing capacity. Defendant directed plaintiff to use the device with his right hand. Plaintiff disobeyed defendant's directive and put the device in his left hand. Defendant again directed plaintiff to put the device in his right hand and plaintiff did so. Then plaintiff stood in his cell staring at defendant and did not use the pocket peak. Defendant told plaintiff several times to either use the device or return it. Plaintiff did neither. Defendant gave plaintiff a final directive to use the device or return it and plaintiff continued to refuse to do either.

Defendant believed that because the pocket peak device was made of hard plastic it could be used as a weapon and concluded that allowing plaintiff to keep the device would be a threat to the safety and security of the institution, the staff, other inmates and plaintiff himself. Defendant used the tether strap to pull defendant's right hand out of the trap in the cell door and retrieve the device from him. Plaintiff resisted as defendant pulled on the tether strap. After he recovered the pocket peak, defendant directed plaintiff to hold still so the tether strap could be removed. Plaintiff continued to resist so defendant placed plaintiff's wrist in a compliance hold and directed him to face away from defendant. Plaintiff complied and correctional officer Mlodzik removed the handcuff and tether from plaintiff's right wrist and secured the trap.

After the tether was removed and the trap was secured, plaintiff punched his cell door with his right hand, causing blood to splatter on the door. Plaintiff saw nurse Freeman approximately one hour after the incident. Plaintiff had abrasions on his knuckles and swelling on his right wrist. Plaintiff told Freeman that defendant had battered him for no reason and had broken his wrist and caused abrasions on his knuckles. After examining plaintiff, Freeman wrote the following in plaintiff's medical chart: "no active bleeding, no visible deformity." Freeman gave plaintiff bandaids and a wrist wrap and scheduled an appointment for plaintiff to see a physician the next day.

On April 29, 2003, plaintiff met with physician Witte. Witte examined plaintiff's

right wrist and determined that it did not appear to be fractured. Nonetheless, Witte ordered an x-ray to check for fractures. Plaintiff later decided not to keep the x-ray appointment.

On May 16, 2003, plaintiff had another appointment with Freeman. Plaintiff complained of pain and throbbing in his right wrist and right index finger. The same day, Witte ordered an x-ray of plaintiff's right wrist and right index finger. Again, plaintiff did not keep his scheduled x-ray appointment. On May 23, 2003, Witte examined plaintiff's right wrist and told him he could stop wearing the ace wrap in two weeks.

DISCUSSION

Plaintiff contends that defendant used excessive force in violation of the Eighth Amendment's prohibition on cruel and unusual punishment by pulling his tethered hand through the trap on his cell door, injuring his finger, wrist and forearm. 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." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court must consider evidence revealing 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. Whitley v. Albers, 475 U.S. 312, 321 (1986).

The facts show that defendant pulled plaintiff's tethered right arm through the trap on his cell door because plaintiff was refusing to return the pocket peak to defendant and defendant believed that if plaintiff kept the device he could use it to hurt himself or other inmates and staff. Defendant's actions were necessary to prevent future injuries that might have occurred if plaintiff had been allowed to keep the pocket peak. The facts do not bear out plaintiff's claim that some part of his wrist, finger or hand was broken in the process. Indeed, the facts reveal that Dr. Witte determined that plaintiff was not suffering from a fracture. Although he was willing to x-ray the area to confirm his assessment, plaintiff refused to submit to an x-ray.

In any event, because plaintiff has failed to adduce facts that would allow a jury to find that defendant used more force than was necessary under the circumstances, I will grant defendant's motion for summary judgment.

ORDER

IT IS ORDERED that

1. Defendant Gregg A. Schueffner's motion for summary judgment is GRANTED;

2. Plaintiff's motion for summary judgment is DENIED;

3. Plaintiff's motion to strike defendant's reply brief is DENIED;

4. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 2nd day of November, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge