IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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REGGIE TOWNSEND,

OPINION AND ORDER

Plaintiff,

05-C-204-C

v.

LARRY FUCHS, JEFF JAEGER
and JERRY ALLEN,

Defendants.

- -

On November 15, 2004, plaintiff Reggie Townsend, an inmate at the New Lisbon Correctional Institution, was placed in temporary lock-up following a riot at the institution. In this civil action for monetary relief under 42 U.S.C. § 1983, plaintiff has asserted two claims against correctional officers at New Lisbon, defendants Larry Fuchs, Jeff Jaegar and Jerry Allen, that arise out of his confinement in temporary lock-up. First, plaintiff argues that the conditions of confinement in temporary lock-up violated his Eighth Amendment protection against cruel and unusual punishment. Second, he argues that his transfer to temporary lock-up violated his rights under the due process clause of the Fourteenth Amendment. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court is a motion for summary judgment filed by defendant Fuchs, in which he argues that he is entitled to summary judgment with respect to plaintiff's Eighth Amendment claim. After defendant filed his motion, I allowed plaintiff to amend his complaint to add defendants Jaeger and Allen to this lawsuit and to add the due process claim. I gave defendant Fuchs the option of withdrawing his summary judgment motion and responding to both claims, but he has decided to pursue the motion. Because the motion addresses only one of the two claims raised against defendant Fuchs, I will treat the motion as a motion for partial summary judgment. For the reasons stated below, I will grant defendant's motion. In brief, there is no evidence from which a reasonable jury could conclude that defendant Fuchs knew that plaintiff was sleeping on a wet mattress in temporary lock-up.[1]

One note about the parties' proposed findings of fact merits brief discussion. I disregarded proposed findings of fact that were phrased in terms of what a party admitted or testified to at deposition. For example, plaintiff proposed as a fact that "Defendant Jaeger admitted in his deposition that NLCI had plenty of extra mattresses." What a person

[1]Although defendants Jaeger and Allen have not asked for permission to join defendant Fuchs' motion, they filed proposed findings of fact that appear designed to establish that they did not know about plaintiff's wet mattress. Plaintiff's responses to these proposed findings place into dispute the question whether defendants Jaeger and Allen knew about the mattress. Therefore, even if I were to construe the submission of these additional proposed findings as a request to join defendant Fuchs' motion, I would deny the request.

admitted, indicated or testified to at his deposition is not relevant to the claims in this case. The better way to state the proposed finding would be as follows: "New Lisbon had plenty of extra mattresses." Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings. For example, in response to plaintiff's proposed finding of fact quoted above, defendant responded "No Dispute." The question is, to what is defendant admitting: that defendant Jaeger made the statement at his deposition, or that New Lisbon had plenty of extra mattresses? Accordingly, I disregarded all of the facts so proposed.

From the parties proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Reggie Townsend has been incarcerated at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, since June 22, 2004.

Defendant Larry Fuchs has been employed by the Wisconsin Department of Corrections as Security Director at New Lisbon since November 15, 2004. In that capacity, his duties include insuring the safety and security of inmates and staff at the institution;

developing, implementing and modifying the institution's security program; directing day-to-day security operations; collaborating with Department of Corrections officials and state and local law enforcement officials with respect to security matters; assuming direction of the institution in the absence of the Warden and Deputy Warden; and implementing affirmative action and civil rights compliance plans.

Defendant Fuchs does not personally supervise inmate living conditions in general population units or in the segregation unit. Occasionally, he makes rounds of the prison units. However, he does not visit or observe inmate cells unless there is a concern. Instead, he relies on his segregation captain and other officers in the segregation unit to inform him of problems that arise. Also, defendant Fuchs does not receive inmate complaints concerning living conditions personally. The institution's inmate complaint examiner is responsible for reviewing inmate complaints and making recommendations for their disposition. Defendant Fuchs is notified of an inmate complaint when it concerns his department and the warden or inmate complaint examiner sends him a copy. Also, he may be notified verbally or by email of the nature and disposition of inmate complaints concerning living conditions.

B. Temporary Lock-Up

Temporary lock-up is a form of administrative segregation. Inmates placed in temporary lock-up live in the same conditions as inmates placed in punitive forms of

segregated confinement. However, unlike inmates in punitive segregation, inmates in temporary lock-up continue to receive pay, do not lose good time credits and do not receive extensions of their sentences.

The New Lisbon Correctional Institution has 52 cells in its segregation unit. Forty six of the cells are regular cells and six cells are for observation. Each segregation cell contains one bunk, sink, toilet and shower with a drain on the floor. The placement of these items is the same in all segregation cells. Water from the shower sprays to an area beyond the drain before draining through the floor. It hits the walls and cell floor before draining. The showers are not positioned in the cells to punish inmates. When inmates are double celled, one inmate must sleep on a mattress on the floor. Regardless whether an inmate sleeps on the floor or on the bunk, he is provided with clean bedding materials and linens. Inmates in segregation are given the opportunity to clean their cells three times each week.

C. Plaintiff's Placement in Temporary Lock-Up

On November 11, 2004, a riot broke out in Unit A at New Lisbon. Numerous inmates attacked staff on the unit and staff that responded to the emergency. At least one inmate assaulted staff members with a lock he placed in his sock. More than a dozen staff members were injured. Officials believed the Vice Lords gang was involved in the riot. (Plaintiff is not a member of this gang; he used to be a member of the Gangster Disciples,

a rival gang.) After the riot, Warden Catherine Farrey suspended all rules at New Lisbon until November 30, 2004. On November 15, 2004, plaintiff was placed in temporary lock-up pending an investigation to determine whether he was involved in the riot.

The number of inmates who were being investigated in connection with the riot was greater than the number of available segregation cells. As a result, some of the inmates had to be double celled. Plaintiff was double celled with an inmate named Larry Gibson. Gibson had already claimed the bunk off the floor when plaintiff was placed in the cell. For the entire time he was double celled with Gibson, November 15, 2004 to January 13, 2005, plaintiff slept on a mattress on the floor. During this time, the mattress remained wet because water from the shower leaked onto it. He was not the only inmate to sleep on a floor mattress in temporary lock-up during that time. When plaintiff asked for a new mattress, he was told that he could not have a new mattress because if he received one, everyone else in the segregation unit would have to get one.

Because of the large number of inmates involved, it took several months to conduct the investigation of the riot. Although plaintiff was not found to have been involved in the riot, the investigation determined that he may have become disruptive during the lockdown. While plaintiff was detained in temporary lock-up, he did not receive a conduct report, continued to earn his salary and did not lose any good time credits. Plaintiff was released to general population on January 13, 2005, after sixty-three days in temporary lock-up.

The method of voicing a complaint in segregation with the quickest response time is to inform a correctional officer using the intercom system inside each cell, followed by verbal complaints to correctional officers in the unit, including segregation sergeants. Also, an inmate may write to the security director using an information/interview request slip. Defendant Fuchs does not retain copies of information/interview request slips that are sent to him; he returns them to inmates after he has responded to them. The inmate complaint review system has the longest response time, about one or two weeks.

Plaintiff addressed numerous information/interview request slips to defendant Fuchs about the conditions of his confinement in segregation, including being forced to sleep on a wet, moldy and smelly mattress. Also, he complained verbally to officers in the unit, including defendant Jerry Allen. In addition, plaintiff filed inmate complaints about the condition of his mattress and his status in segregation.

Defendant Fuchs did not personally visit or observe any cell in the segregation unit between November 15, 2004 and January 13, 2005. He did not speak personally with plaintiff or any other inmate about wet mattresses or unsanitary cell conditions during that time. If officers in the segregation unit had seen a wet mattress or other unsanitary conditions in a segregation cell, they should have filed an incident report and informed defendant Fuchs. Likewise, defendant Fuchs should have been informed if an inmate had complained verbally or filed an inmate complaint about having to sleep on a wet mattress

or in unsanitary conditions. Defendant should have received interview requests sent to him by inmates. If defendant had received a complaint about a wet mattress and an investigation led him to believe that the allegation was true, he would have replaced the inmate's mattress. However, defendant was not informed of any wet mattresses or other unsanitary conditions in any inmate cells between November 15, 2004 and January 15, 2005. Also, he was not notified of and did not receive any inmate complaints or interview requests concerning unsanitary conditions during this time.

Defendant Fuchs did receive two interview requests from plaintiff but neither were related to his cell conditions. The first complaint about plaintiff's cell conditions that came to defendant's attention was received by the inmate complaint examiner on January 31, 2005, eighteen days after plaintiff was released from temporary lock-up. Jill Sweeney, the inmate complaint examiner at New Lisbon, had access to records that are generated and maintained at the institution pertaining to the inmates who are incarcerated there. Her review of plaintiff's inmate complaint history revealed that he filed seven complaints between the dates of November 15, 2004 and January 31, 2005. Sweeney's review of the inmate complaint history of plaintiff's cellmate in temporary lock-up, Larry Gibson, revealed that Gibson had filed four complaints between November 15, 2004 and January 13, 2005 and that the only mention of cell conditions in these complaints was a complaint Gibson raised concerning a lack of outdoor recreation.

Because he slept for sixty-three days on a wet, moldy and foul smelling mattress, plaintiff suffered respiratory problems, chest and stomach pains and muscle aches.

DISCUSSION

Section 1983 provides a cause of action for individuals whose constitutional rights are violated by persons acting under color of state law. In this case, plaintiff contends that the conditions of his confinement in temporary lock-up violated his Eighth Amendment protection against cruel and unusual punishment. In Rhodes v. Chapman, 452 U.S. 337, 347 (1981), the Supreme Court stated that conditions in prison "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." An inmate alleging that the conditions of his confinement fall below the standard imposed by the Eighth Amendment must prove two things. First, he must establish that the conditions were objectively serious. That is, he must show that they deprived him of "'basic human needs' or 'the minimal civilized measure of life's necessities.'" Antonelli v. Sheahan, 81 F.3d 1422, 1427 (7th Cir. 1996) (quoting Rhodes, 452 U.S. at 347)). Second, he must prove that the prison official or officials responsible for the conditions acted with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 302 (1991). In Wilson, 501 U.S. at 303, the Court held that the deliberate indifference standard, which is used to analyze inadequate medical care claims

under the Eighth Amendment, applies also to conditions of confinement claims.

Although the parties dispute whether plaintiff's mattress was wet and moldy when he first arrived in temporary lock-up, defendant does not disagree with plaintiff's contention that water from the shower leaked onto plaintiff's mattress. Defendant assumes that being forced to sleep on a wet mattress for sixty-three days is sufficiently serious to satisfy the first prong of the Eighth Amendment inquiry. Dft.'s Br., dkt. #42, at 4. He contends that he is entitled to summary judgment because plaintiff cannot establish that defendant was deliberately indifferent to the conditions in which plaintiff was confined in temporary lock-up. In discussing what constitutes deliberate indifference, the Supreme Court has stated that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 837 (1994). "Knowledge of a risk can be shown if an official was exposed to information from which the inference could be drawn that a substantial risk exists, and he or she also draws the inference." Pierson v. Hartley, 391 F.3d 898, 902 (7th Cir. 2004). Also, a jury may infer that a prison official knew of a risk if it was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk." Farmer, 511 U.S. at 842.

The facts reveal that defendant Fuchs did not know that plaintiff was sleeping on a wet mattress while in temporary lock-up. During the time plaintiff spent in temporary lock-up, he never observed a wet mattress in plaintiff's cell personally, never spoke with plaintiff about a wet mattress, never received an inmate complaint or interview request from plaintiff about a wet mattress and was never informed by any other officials at New Lisbon that plaintiff had complained about a wet mattress.

Plaintiff argues that there is evidence from which a jury could conclude that defendant knew about his wet mattress. Specifically, he contends that he (1) sent numerous interview requests to defendant about his wet mattress; (2) filed inmate complaints concerning his living conditions; and (3) complained verbally to officers in the segregation unit, including defendant Allen. In addition, plaintiff notes that (1) defendant's subordinates should have informed him about plaintiff's verbal complaints; (2) defendant should have been informed about inmate complaints that concerned living conditions in the segregation unit; and (3) defendant should have received interview requests addressed to him. He argues that, construed in the light most favorable to him, this evidence presents a genuine issue of fact concerning defendant's knowledge that cannot be resolved on summary judgment.

Plaintiff is incorrect. At best, the evidence shows that defendant Fuchs should have known that plaintiff had complained about having to sleep on a wet mattress. This is not

sufficient to raise a genuine issue of fact concerning whether defendant actually knew of the conditions in plaintiff's cell. Pierson, 391 F.3d at 902 ("Negligence on the part of an official does not violate the Constitution, and it is not enough that he or she should have known of a risk"); Case v. Ahitow, 301 F.3d 605 (7th Cir. 2002); Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996) (per curiam) ("Mere negligence (for example if a prison guard should know of a risk but does not) is not enough to state a claim of deliberate indifference under the Eighth Amendment"). Nor is there any evidence that defendant Fuchs knew before plaintiff was placed in temporary lock-up that the institution had a longstanding or well-documented problem with shower water leaking onto mattresses in the segregation unit.

The simple fact is that plaintiff has not presented any evidence suggesting that defendant Fuchs knew that plaintiff was sleeping on a wet mattress during his time in temporary lock-up. If plaintiff had submitted evidence of a complaint he filed about his wet mattress that contained defendant Fuchs' signature or initials, he could have put into dispute defendant's averment that he did not receive any complaints from plaintiff. But plaintiff has not introduced into evidence any of the inmate complaints or interview requests he claims he filed while he was in temporary lock-up. He faults defendant for not explaining why his written and verbal complaints did not reach him, but defendant need not provide an explanation. As the party moving for summary judgment, defendant may satisfy its burden merely by pointing to a lack of evidence in the record on one of the elements of plaintiff's

claim. Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir. 2001). "To survive a defendant's motion for summary judgment, a plaintiff must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial." Tri-Gen Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO, 433 F.3d 1024, 1030-31 (7th Cir. 2006).

Plaintiff's evidence would be sufficient to raise an issue of fact with respect to whether the officers he spoke with knew about his wet mattress. However, it is not sufficient to contradict defendant's sworn testimony that from November 15, 2004 to January 15, 2005, he did not receive any of plaintiff's complaints, was not notified of them by other officials and did not learn of plaintiff's wet mattress by speaking with him or observing it personally.

In a related argument, defendant argues that plaintiff has not presented any evidence that defendant was personally involved in the violation of his Eighth Amendment rights. Liability under § 1983 hinges on a state actor's personal involvement in a constitutional deprivation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003). As the security director at New Lisbon, defendant Fuchs occupies a supervisory role. However, section 1983 "does not allow actions against individuals merely for their supervisory role of others." Zimmerman v. Tribble, 226 F.3d 568, 574 (7th Cir. 2000). Defendant Fuchs may not be held liable unless he caused or participated in the alleged constitutional violation. Id. Direct participation is not necessary; the personal involvement requirement is met if a prison

official acts or fails to act in deliberate indifference to an inmate's constitutional rights or if the conduct causing the violation occurs at his direction or with his knowledge and consent. Maltby v. Winston, 36 F.3d 548, 559 (7th Cir. 1994). However, my conclusion that defendant Fuchs did not know that plaintiff was sleeping on a wet mattress while plaintiff was confined in temporary lock-up precludes plaintiff from establishing defendant's personal involvement in the alleged violation of his Eighth Amendment rights.

Because there is no evidence from which a reasonable jury could conclude that defendant Fuchs knew that plaintiff was sleeping on a wet mattress in temporary lock-up or that he was personally involved in forcing defendant to sleep on a wet mattress, defendant is entitled to summary judgment with respect to plaintiff's Eighth Amendment claim. This conclusion makes it unnecessary to address defendant's argument that he is entitled to qualified immunity.

Plaintiff's Eighth Amendment claim remains pending against defendants Jaegar and Allen and his due process claim remains pending against defendants Fuchs, Jaegar and Allen.

ORDER

IT IS ORDERED that defendant Larry Fuchs' motion for partial summary judgment is GRANTED and plaintiff's Eighth Amendment claim against defendant Fuchs is DISMISSED.

Entered this 9th day of May, 2006.

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