

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHAROME ANDRE POWELL,

Petitioner,

ORDER

v.

06-C-58-C

SERGEANT FINK, LIEUTENANT DURDIN,
CORRECTIONAL OFFICER KOPEHAMER,
CAPTAIN SEAN SALTER, JANEL NICKEL,
Security Director, GREGORY GRAMS, Warden,
NURSE HAHNISCH and JOHN DOES 1-10,

Respondents.

This is a proposed civil action for declaratory and monetary relief under 42 U.S.C. § 1983. Petitioner Sharome Andre Powell, an inmate at the Waupun Correctional Institution in Waupun, Wisconsin, contends that respondents violated his constitutional rights under the Eighth Amendment of the United States Constitution.

In an order dated February 2, 2006, I concluded that petitioner does not have the means to make an initial partial payment of the filing fee. I now address his proposed complaint, which I construe liberally, as I must. Haines v. Kerner, 404 U.S. 519, 521 (1972). When the litigant is a prisoner, the court must examine the prisoner's claims,

interpreting them broadly, and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

In July 2005, petitioner was incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. Some time prior to July 8, 2005, petitioner covered the window of his prison cell in violation of prison rules. As a consequence, petitioner was placed in controlled segregation status. At approximately 9:40 p.m. on July 8, 2005, respondents Durdin and Kopehamer escorted petitioner from his segregation cell to the prison's shower area. Because petitioner agreed that his actions had led to increased surveillance of his activities, he cooperated fully with respondents Durdin and Kopehamer.

While petitioner was standing in the shower stall, respondent Kopehamer placed "additional mechanical restraints" on petitioner's wrist. Respondent Kopehamer stood to the left of petitioner, holding petitioner on the upper portion of his left arm.

As petitioner stood in the shower, he asked respondent Durdin into what cell he would be placed following his shower.

Respondent Durdin told petitioner, "Cell number 46." Petitioner objected

immediately, stating, “Hell, no! I am not going into that dirty ass cell.”

Petitioner demanded that he be returned to Cell 17, the cell from which he had just been removed. In response, respondent Kopehamer lowered his hand to petitioner’s wrist, twisting it slightly and causing petitioner mild discomfort. Respondent Kopehamer directed petitioner to “calm down.”

Suddenly, respondent Fink emerged from the observation area’s control booth, reached across petitioner’s face and grabbed him by the head. At the same time, respondent Kopehamer applied increased pressure to petitioner’s wrist, causing him discomfort.

When petitioner asked why respondent Kopehamer was twisting his wrist, he was directed to calm down and “just keep facing the shower.” Petitioner responded by provoking respondent Fink, who shouted to petitioner to “stop resisting.” Petitioner was not resisting; instead he was “making [graphic] sexual comments about respondent Fink’s female family members.” Petitioner continued to make lascivious remarks, and as he did so respondent Fink pressed petitioner’s face against the shower door. Petitioner tried to tell respondents Kopehamer and Fink that he objected to having his face and lips smashed against the “nasty” shower door, but respondents drowned out his objections by shouting for petitioner to “stop resisting.” Then, respondent Fink grabbed petitioner’s head and forcefully shoved it into the shower door, causing bleeding and swelling above petitioner’s left eye.

Soon thereafter, additional officers arrived on the scene , including respondent Sean

Salter, who threatened petitioner with an electronic stunning device. When petitioner told prison staff that he was bleeding, they initially told him the blood was “just paint.” Petitioner responded with a stream of angry obscenities.

Petitioner demanded that pictures be taken of his injuries and that he be taken to see a nurse. When respondent Durdin led petitioner to believe he had to choose between having photographs taken and receiving medical treatment, petitioner chose to receive medical care at the prison’s health services unit. While petitioner was awaiting treatment, he overheard respondent Salter whispering something to the nurse about petitioner’s injuries. After petitioner’s wounds had been cleaned, photographs were taken of petitioner’s injuries.

Next, petitioner was taken to Cell 46, a controlled segregation cell. Petitioner was placed in the cell without any clothing. Feces had been smeared on the cell walls, vents, floor and food trap. Blood was smeared on the ceiling and toothpaste was on the vents. The cell smelled strongly of urine. Petitioner told unidentified prison officers that he was concerned about his health, especially since the wound over his eye had begun to bleed again. The officer in charge told petitioner he would “take care of” the problem, but no action was taken to clean the cell.

Petitioner remained in the cell for more than 35 hours. During that time, he was given no mattress, towels, toilet paper, running water, blanket or hygiene products. Petitioner took the paper bag in which his food was delivered and used it as underwear.

Even after petitioner was taken out of observation status, he continued to receive only bag meals for 30 days. As a result, petitioner lost seven pounds.

On July 9, 2005, petitioner's eye began bleeding again, necessitating a second trip to the health services unit.

Since July 8, 2005, petitioner has been diagnosed with post-traumatic stress disorder and for a time took medication for the problem. The attack caused petitioner significant distress, which has taken the form of numbness, sleep disturbances, depression, anxiety, irritability and periodic outbursts of anger.

OPINION

I understand petitioner to be raising two claims, both arising under the Eighth Amendment: that respondents Durdin, Fink and Kopehamer slammed his head into a shower door in violation of his constitutional right to be free from excessive force; and that unnamed respondents caused him to be placed naked in a filthy cell for 35 hours, exposing him to cruel and unusual conditions of confinement.

In addition to the respondents named above, petitioner has named as respondents Sean Salter, Janel Nickel, Gregory Grams and Nurse Hanisch. It is well established that liability under § 1983 must be based on a defendant's personal involvement in a constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine

v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). Petitioner has made no factual allegations with respect to respondents Hanisch, Nickel and Grams. Petitioner has alleged that respondent Salter threatened to use a stunning device on him, but has not alleged that Salter did so. Because petitioner has not alleged facts from which it could be inferred that these respondents did anything to deprive him of his constitutional rights, petitioner will not be allowed to proceed against them.

A. Excessive Force

The Eighth Amendment prohibits conditions of confinement that “involve the wanton and unnecessary infliction of pain.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). 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 considers factual allegations 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); Outlaw v. Newkirk, 259 F. 3d 833, 837 (7th Cir. 2001).

Petitioner admits that he spoke rudely to respondents Durdin, Fink and Kopehamer, but denies having physically resisted them in any way. Despite his physical compliance, petitioner contends, respondent Fink slammed his head into the shower door while respondents Durdin and Kopehamer encouraged Fink, by shouting at petitioner to stop resisting. If petitioner's allegations are true, respondent Fink used more force than was necessary to obtain petitioner's compliance with his directives and respondents Durdin and Kopehamer were complicit in Fink's illegal behavior. Petitioner's allegations are sufficient to state a claim under the Eighth Amendment against respondents Durdin, Fink and Kopehamer; therefore, he will be granted leave to proceed on this claim.

B. Conditions of Confinement

Next, petitioner contends that his Eighth Amendment rights were violated when unnamed prison officials placed him in a dirty observation cell with no clothing or other personal items. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." Farmer v. Brennan, 511 U.S. 825, 832 (1994). In order to constitute cruel and unusual punishment under the Eighth Amendment, conditions of confinement must be extreme. General "lack of due care" by prison officials will never rise to the level of an Eighth Amendment violation because "it is obduracy and wantonness, not inadvertence or

error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.” Whitley v. Albers, 475 U.S. 312, 319 (1986).

To demonstrate that prison conditions violated the Eighth Amendment, a petitioner must allege facts that satisfy a test involving both an objective and subjective component. Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994). The objective analysis focuses on whether prison conditions “exceeded contemporary bounds of decency of a mature, civilized society.” Id. The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to petitioner. Id.

Petitioner alleges that on July 8, 2005, he was placed in an observation cell that was covered in other inmates’ feces and blood, for a period of 35 hours. He admits that prison officials promised to “take care of” the unsanitary conditions, but contends that they did nothing to clean the cell during the day in which he was held there. The Constitution does not mandate that prison cells be comfortable, or even clean. Courts examining challenges to prison cell conditions have repeatedly held that short periods of confinement in unsanitary conditions do not rise to the level of a constitutional violations. Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988) (depriving prisoner of toilet paper, soap, toothpaste and toothbrush while keeping him in filthy, roach-infested cell for a period of several days was not a constitutional violation); Morissette v. Peters, 45 F.3d 1119, 1122-23, n. 6 (7th Cir.1995) (plaintiff’s “filthy” cell and inadequate cleaning supplies did not violate

Eighth Amendment); Geder v. Godinez, 857 F. Supp. 1334, 1341 (N.D. Ill. 1995) (defective pipes, sinks and toilets, improperly cleaned showers, stained mattresses, accumulated dust and dirt and infestation by roaches and rats did not rise to level of Eighth Amendment violation, alone or in combination); Wilson v. Schomig, 863 F. Supp. 789, 794-95 (N.D. Ill. 1994) (cell containing dirt, dust, roaches, a leaking roof during rainstorms and urine-stained mattress did not violate the Eighth Amendment). Petitioner has not alleged that his temporary placement in the cell caused him anything more than temporary discomfort. Because he has failed to meet the objective component of any Eighth Amendment claim, which is whether the conditions of his confinement rose to the level of cruel and unusual deprivations of the minimal measure of life's most basic necessities, it is unnecessary to consider whether prison officials named as respondents John Does 1-10 disregarded petitioner's complaints. Petitioner will be denied leave to proceed on his claim that placement in the observation cell constituted a violation of his Eighth Amendment rights.

ORDER

_____IT IS ORDERED that

1. Petitioner is GRANTED leave to proceed in forma pauperis on his claim that respondents Fink, Durdin and Kopehamer used excessive force against him in violation of the Eighth Amendment when they slammed his head into a shower door.

2. Petitioner's request for leave to proceed in forma pauperis against the Doe respondents is DENIED with respect to his claim that he was exposed to conditions of confinement that violated the Eighth Amendment's ban on cruel and unusual punishment;

3. Petitioner's request to proceed against respondents Salter, Hanisch, Nickel, Grams and John Does 1-10 is DENIED.

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to respondents' attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

_____6. The unpaid balance of petitioner's filing fee is \$250.00; petitioner is obligated to

pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2) when he has the means to do so.

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state respondents.

Entered this 7th day of February, 2006.

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