IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JEREMY M. WINE,

OPINION AND ORDER

Plaintiff,

08-cv-72-bbc

v.

MICHAEL THURMER, MICHAEL MIESNER,
DONALD STRAHOTA, CAPTAIN MELI, KATHRYN R. ANDERSON,
LT. DANIEL BRAEMER, LT. GREFF, CAPTAIN
GEMPLER, C.O. BEAHM, C.O. TANNER, C.O. PONTOW,
C.O. MEDEMA, C.O. ROSS, SGT. LIND, C.O. GLAMMAN,
C.O. BOVEE, SGT. KELLY BEASLEY, SGT. NAVIS,
NURSE FRANCIS MONROE JENNINGS, NURSE
CHARLENE REITZ, BELINDA SCHRUBBE, C.O. STANIEC,
RICK RAEMISCH, JOHN BETT, DAN WESTFIELD,

Defendants.

- -

In an order dated April 16, 2008, I conducted a preliminary screening of plaintiff's complaint. At that time, I dismissed the Wisconsin Department of Corrections and Division of Adult Institutions on the ground that they are not suable under Fed. R. Civ. P. 17.[1] In

[1]It was error to say in the April 16 opinion that the Wisconsin Department of Corrections and its Division of Adult Institutions were not suable entities under Fed. R. Civ. P. 17. See Wis. Stat. § 301.04 (Department of Corrections may sue and be sued). However, the error was harmless. Whether these entities are suable in some situations, they cannot

addition, I dismissed as legally meritless plaintiff's claims that certain of the defendants had 1) threatened him or called him names; 2) failed to respond to his complaints about threats and taunts; 3) failed to respond to his complaints about defendants Beasley and Tanner; 4) wrote or approved conduct reports issued on October 7, November 8 and November 13, 2007; and 5) conspired to violate plaintiff's constitutional rights. Finally, I applied Fed. R. Civ. P. 18 and 20 to the remaining claims in plaintiff's complaint pursuant to the ruling in George v. Smith, 507 F.3d 605 (7th Cir. 2007). In that regard, I concluded that plaintiff's complaint must be divided into four separate lawsuits that I identified as Lawsuit ##1-4, described in detail in the order. I told plaintiff that he would have to choose which one of the four suits he wished to pursue under the number assigned to this case. I told plaintiff that as to that one lawsuit, his $350 filing fee payment would be applied. With respect to the remaining three actions, I gave plaintiff a choice. He could withdraw any one or more of them voluntarily. If he chose this option, he would not owe a filing fee for any case he dismissed. On the other hand, he could choose to prosecute one or more of the remaining suits. However, in that event, he would owe additional filings fees and would have until

---

be sued in actions like this one brought under 42 U.S.C. § 1983, because that statute limits liability to "persons" only. Will v. Michigan Department of State Police, 491 U.S. 58, 66-67 (1989); Witte v. Wisconsin Department of Corrections, 434 F.3d 1031, 1036 (7th Cir. 2006).

May 6, 2008, in which to pay them.

Now plaintiff has responded to the April 16 order. He says that he will dismiss voluntarily the actions I identified as Lawsuits ## 1, 2 and 4, and that he will prosecute in this case the action identified Lawsuit #3. Lawsuit #3 includes the following claims:

- Defendants Medema, Pontow, Beasley, Ross, Glamman and Bovee assaulted plaintiff on November 13, 2007 and then threw urine on him.
- Defendant Jennings failed to tend to his injuries following the assault and defendant Schrubbe failed to insure that he receive medical attention after he complained about Jennings's inaction.
- Defendants Navis, Lind, Pontow, Medema, Bovee and Glamman refused to let plaintiff shower after he had been doused with urine.

Thus, in all future filings in this case, the caption is to be modified to reflect that the only defendants in the case are defendants Medema, Pontow, Beasley, Ross, Glamman, Navis, Lind and Bovee. The remaining defendants and claims will be dismissed from this action without prejudice to plaintiff's refiling his additional lawsuits at some future time.

As I told plaintiff in the April 16 order, my preliminary review of his claims to identify Rule 20 problems did not take the place of the detailed review his claims require under the screening provision in 28 U.S.C. § 1915A. Therefore, I will conduct that screening now. In performing the screening, I have considered only those allegations in the

complaint that relate to plaintiff's claims in Lawsuit #3. All other allegations in the complaint have been ignored.

ALLEGATIONS OF FACT

Plaintiff Jeremy Wine is a prisoner at the Racine Correctional Institution in Sturtevant, Wisconsin. At all times relevant to this case, he was confined at the Wisconsin Correctional Institution in Waupun, Wisconsin.

Defendants Medema, Pontow, Beasley, Ross, Glamman, Navis, Lind and Bovee are officers or sergeants employed at the Wisconsin Correctional Institution in Waupun. Defendant Jennings is a nurse and defendant Schrubbe in the nurse manager.

On November 13, 2007, while defendant Medema was walking plaintiff to recreation in full restraints, handcuffs, shackles and a waist chain, defendant Pontow came up behind plaintiff and pushed him in the back with his hand saying, "What's up now, tough guy." Pontow then grabbed plaintiff's arm and he and defendant Medema slammed plaintiff's body and face into a wall before dragging him into a cell where defendants Pontow, Beasley, Medema, Ross, Glamman and Bovee beat him up. After the beating, defendant Frances Monroe Jennings verified plaintiff's injuries (pain, bleeding, swelling and bruising), but refused to treat him or send him to a hospital. Plaintiff wrote to defendant Schrubbe to complain about the lack of medical care. Schrubbe did not respond.

That evening, while plaintiff lay naked on his cold cell floor, defendants Beasley, Pontow, Medema, Bovee, Glamman and Ross threw cups full of urine on him. The next day, defendants Navis, Lind, Pontow, Medema, Bovee and Glamman refused to allow plaintiff to take a shower to clean off the urine.

OPINION

From plaintiff's factual allegations, I understand him to be alleging that defendants violated his rights under the Eighth Amendment to be free from the use of excessive force, to be treated in a humane manner and to receive medical care for his serious medical needs. I will address each claim in turn.

A. Excessive Force

In the prison context, excessive force claims arise under the Eighth Amendment. Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, 503 U.S. 1 (1992). 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,

503 U.S. at 6-7. 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, 475 U.S. at 321; Outlaw v. Newkirk, 259 F. 3d 833, 837 (7th Cir. 2001). In Hudson, 503 U.S. at 9-10, the Court explained that although the extent of injury inflicted was one factor to be considered, the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force.

Here, plaintiff alleges that for no reason whatsoever and while he was fully restrained in handcuffs, shackles and a waist chain, defendant Pontow pushed him in the back, grabbed his arm and, with the help of defendant Medema, slammed his face and body into a wall, all of which was followed immediately by a full beating from defendants Pontow, Beasley, Medema, Ross, Glamman and Bovee. As a result of the assault, plaintiff suffered pain, bleeding, swelling and bruising. This is enough to state a claim that defendants Pontow, Beasley, Medema, Ross, Glamman and Bovee used more force than was necessary under the circumstances in violation of the Eighth Amendment.

B. Conditions Exceeding Contemporary Standards of Decency

Also, plaintiff alleges that defendants Pontow, Beasley, Medema, Ross, Glamman and

Bovee threw urine on him and that the next day, defendants Navis, Lind, Pontow, Medema, Bovee and Glamman refused to allow plaintiff to take a shower to clean off the urine. The Constitution prohibits punishment that is "totally without penological justification. Gregg v. Georgia, 428 U.S. 153, 183 (1976). To state a claim of a violation of his Eighth Amendment rights with respect to this incident, the court focuses on the nature of the defendants' alleged acts and whether the conditions plaintiff was forced to endure exceeded contemporary bounds of decency of a mature, civilized society. Jackson v. Duckworth, 955 F.2d 21, 22 (7th Ci. 1992). What the defendants did to plaintiff is an objective inquiry; whether what they did exceeds contemporary bounds of decency is subjective. The latter requires a court to ask whether the facts alleged allow an inference to be drawn that prison officials acted wantonly and with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294 (1991). In a case such as this, wantonness means acting "maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320-321 (1986).

Plaintiff's allegations that he was doused in urine and denied the opportunity to clean it off satisfies the objective inquiry. Under any normal circumstance, this sort of act is vile, disgusting and without any apparent penological justification. Although defendants may be able to show at a later stage of these proceedings that there was a legitimate reason to deny plaintiff's request to shower the day after he was doused in urine, at this early stage, plaintiff

has alleged enough to suggest that the acts of defendants Pontow, Beasley, Medema, Ross, Navis, Lind, Glamman and Bovee were taken malicious and sadistically for the sole purpose of humiliating and degrading him. Therefore, I will allow plaintiff to proceed on his claim that defendants Pontow, Beasley, Medema, Ross, Glamman and Bovee threw urine on him on November 13, 2007, and that the next day, defendants Navis, Lind, Pontow, Medema, Bovee and Glamman refused to allow plaintiff to take a shower to clean off the urine.

C. Denial of Medical Care

Plaintiff contends that after he was beaten on November 13, 2007, defendant Frances Monroe Jennings, a nurse, confirmed that plaintiff was in pain and bleeding and that he was swollen and bruised. Nevertheless, she refused to treat him or send him to a hospital. Plaintiff alleges as well that when he wrote to defendant Schrubbe to complain about the lack of medical care, Schrubbe did not respond.

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To prevail ultimately on a claim under the Eighth Amendment, a prisoner must prove that prison officials engaged in "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584 -85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if the condition causes serious pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). However, "the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense." Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir.1985). "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Under this standard, the first question is whether plaintiff had a serious health care need. Unfortunately, even drawing all inferences in plaintiff's favor, plaintiff's scant allegations do not allow an inference to be drawn that he did. Plaintiff concedes that defendant Jennings assessed his medical needs and then declined to treat him or send him to the hospital, and he alleges nothing from which an inference may be drawn that her assessment was reckless in the criminal law sense. All he says is that he was in pain, bruised, swollen and bleeding.

A person can be bruised, swollen, bleeding and hurting and not have a serious medical need. For example, the Court of Appeals for the Seventh Circuit has held that a split lip and swollen cheek from an assault do not rise to the level of an objectively serious medical need so as to violate the Eighth Amendment. Pinkston v. Madry, 440 F.3d 879 (7th Cir. 2006). Again in Davis v. Jones, 936 F.2d 971, 972-73 (7th Cir. 1991), the court held that a scraped elbow and a one-inch laceration to an arrestee's temple that was not deep enough or long enough to require stitches was not a serious medical need under the Eighth Amendment. In each one of these scenarios, pain would like accompany the injury. From what plaintiff has alleged, it is impossible to infer that he suffered anything more than temporary discomfort which, by itself, is not enough to trigger Eighth Amendment protections. Caldwell v. Miller, 790 F.2d 589, 601 (7th Cir. 1986) (prisoner must allege more than discomfort to state an Eighth Amendment claim). Because plaintiff's allegations that he suffered pain, swelling, bleeding and bruising do not allow an inference to be drawn that his injuries were objectively serious, I will not allow him to proceed on his claim that defendants Jennings and Schrubbe were deliberately indifferent to his serious medical needs.

ORDER

IT IS ORDERED that

1. Plaintiff's claims identified in this court's order of April 16, 2008 as making up

Lawsuit ## 1, 2 and 4 are DISMISSED without prejudice to plaintiff's refiling these claims at some later date. Plaintiff does not owe a filing fee for any of these actions.

2. Plaintiff may proceed on his claims that

a. defendants Medema, Pontow, Beasley, Ross, Glamman and Bovee assaulted plaintiff on November 13, 2007 and then threw urine on him; and

b. defendants Navis, Lind, Pontow, Medema, Bovee and Glamman refused to let plaintiff shower after he had been doused with urine.

3. Plaintiff's claim that defendant Francis Monroe Jennings failed to tend to his injuries following the November 13 assault and defendant Belinda Schrubbe failed to insure that he receive medical attention after he complained about Jennings's inaction is DISMISSED for plaintiff's failure to state a claim upon which relief may be granted.

4. Defendants Francis Monroe Jennings, Belinda Schrubbe, Michael Thurmer, Michael Miesner, Donald Strahota, Captain Meli, Kathryn R. Anderson, Lt. Daniel Braemer, Lt. Greff, Captain Gempler, C.O. Beahm, C.O. Tanner, Charlene Reitz, C.O. Staniec, Rick Raemisch, John Bett and Dan Westfield are DISMISSED from this case.

5. A strike is recorded against plaintiff for raising in his complaint in this case claims that were required to be dismissed in this order and the order of April 16, 2008 as legally meritless.

6. For the remainder of this lawsuit, plaintiff must send defendants a copy of every

paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

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

8. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint, this order and the order of April 16, 2008 are being sent today to the Attorney General for service on the state defendants.

Entered this 29th day of April, 2008.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge