

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

MARK MARSHALL,

Petitioner,

v.

SERGEANT WILLIAM HOLM,

Respondent.

ORDER

08-c-398-bbc

This is a proposed civil action for monetary relief brought under 42 U.S.C. § 1983. Petitioner Mark Marshall, a prisoner who is housed at the Waupun Correctional Institution in Waupun, Wisconsin, requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioner alleges that respondent Holm used excessive force in violation of his Eighth Amendment rights and retaliated against petitioner in violation of his First Amendment rights. Petitioner's request will be granted in part and denied in part.

Petitioner previously filed these allegations along with other claims against multiple defendants in Marshall v. Nickel, 06-cv-617-bbc. I dismissed these claims without prejudice because they were filed prior to George v. Smith, 507 F.3d 605 (7th Cir. 2007), which now requires petitioners with unrelated claims against different defendants to bring separate

lawsuits. I gave the petitioner the opportunity to refile this lawsuit.

Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915. However, because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In his complaint and attached materials, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is an inmate at the Waupun Correctional Institution in Waupun, Wisconsin. Sergeant William Holm is the Segregation Supervisor at the institution.

On January 1, 2007, while petitioner was housed in segregation, respondent Holm approached petitioner and asked him whether he enjoyed being sprayed in the face with gas and, if so, then petitioner should step back from the bars of his cell. Believing respondent was joking, petitioner stepped away from the bars and was sprayed by Holm. The gas caused petitioner to choke and temporarily lose his vision. Holm then demanded that petitioner

approach the cell door to be restrained. Upon complying with the Holm's order, petitioner was again sprayed in the face with gas.

Petitioner believes that respondent Holm sprayed him in the face two times because he wanted to retaliate against petitioner for "degrading [Holm] to the point he was visibly upset" two weeks earlier.

DISCUSSION

A. Excessive Force

In determining whether an officer has used excessive force against a prisoner, the question is "whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320 (1986). The factors relevant to making this determination include the need for the application of force; the relationship between the need and the amount of force that was used; the extent of injury inflicted; the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and any efforts made to temper the severity of a forceful response. Id. at 321. In Hudson v. McMillan, 503 U.S. 1, 9-10 (1992), the Court added that the absence of a significant injury would not bar a prisoner's claim if the officers used more than a minimal amount of force.

In this case, petitioner alleges that respondent Holm sprayed him in the face with gas even though petitioner was not a threat to himself, other inmates or the staff; therefore, there was no need for the application of force. In fact, petitioner alleges that respondent sprayed him for no reason other than to punish petitioner for verbal statements he had made. From petitioner's allegations that he was choking and momentarily blinded by the gas, it can be inferred that more than a minimal amount of force was used. Therefore, petitioner has pleaded sufficient facts to state a claim that his Eighth Amendment rights were violated. Thus, I will allow him to proceed on his claim of excessive force against respondent Holm.

B. Retaliation

Prison officials violate the Constitution when they retaliate against a prisoner "for the exercise of a constitutionally protected right." Lekas v. Briley, 405 F.3d 602, 614 (7th Cir. 2005). Under the First Amendment, a prisoner's speech is protected if it relates to a matter of "public concern." McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005). Although speech that criticizes prison officials has been held to be protected as a matter of "public concern," Ustrak v. Fairman, 781 F.2d 573, 577-78 (7th Cir. 1986), prisoners do not have a constitutionally protected right to berate prison officials or show disrespect for them. Id. at 580 (upholding a First Amendment challenge to a prison policy that prohibited prisoners

from using speech that was "disrespectful to any employee of the institution"). Finally, a prison official's action will be deemed retaliation if the effect of their actions is to silence or "inhibit the exercise of [a] protected right." Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998).

Petitioner's retaliation claim against respondent fails because the speech petitioner alleges he engaged in is not speech of public concern. Petitioner himself characterizes his statements towards respondent as "degrading." Speech meant to instill disdain and disrespect for prison officials is not protected. Ustrak, 781 F.2d at 580. Additionally, petitioner has failed to allege that respondent's actions have either silenced or inhibited his desire to speak out against prison officials. Although Holm's alleged reaction was inappropriate, petitioner has failed to state a claim for the violation of his First Amendment rights. Thus, petitioner will be denied leave to proceed on his claim of retaliation.

ORDER

IT IS ORDERED that:

1. Petitioner Mark Marshall's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Sergeant William Holm used excessive force against him in violation of the Eighth Amendment.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claim

that respondent Holm retaliated against him in violation of the First Amendment.

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

4. 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.

5 . Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint (Dkt. 1) and this order are being sent today to the Attorney General for service on respondent.

6. Because I have dismissed a portion of petitioner's complaint for one of the reasons listed in 28 U.S.C. 1915(g), a strike will be recorded against him.

Entered this 9th day of September, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge