IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SAMUEL S. UPTHEGROVE,

Petitioner,

v.

CHARLES TUBBS, PAUL WESTERHOUSE, MR. OURADA, BRUCE SUNDE, SUPERVISOR BRANDT, YC KRAFT, YC GERDES, and JOHN DOES 3-10,

Respondents.

OPINION and ORDER

08-cv-661-slc[1]

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This case involves claims severed from another lawsuit, Case No. 08-cv-552-slc. Petitioner's complaint could not be treated as a single lawsuit under Fed. R. Civ. P. 20, so I gave him an opportunity to choose which of the separated lawsuits he would like to pursue. Petitioner chose to pursue two lawsuits; this is one of them.

In this lawsuit, petitioner claims that (a) on March 19, 2005, respondents Brandt, Kraft, Gerdes, and John Does ##3-10 violated his Eighth Amendment rights during a cell

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[1]Because the parties have not yet consented to the magistrate judge's jurisdiction to decide dispositive questions in this case, I am ruling on the question whether petitioner may proceed with one or more of the claims raised in his proposed amended complaint.

entry; and (b) respondents Tubbs, Westerhouse, Ourada, Sunde are liable for that violation for failure to train their employees.

Although I have reviewed petitioner's pleading for problems under Rule 20, I have yet to address its merits. Because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny him leave to proceed if his complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a respondent who by law cannot be sued for money damages. 28 U.S.C. § 1915(e). In screening petitioner's complaint, I must read the allegations generously because he is a pro se litigant. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Because the complaint allows an inference to be drawn that respondents Brandt, Kraft, Gerdes, and John Does ##3-10 used excessive force against him during a cell entry and respondent Gerdes forced him to kneel naked for as long as 90 minutes for the purpose of humiliating and demeaning him, he will be allowed to proceed on his Eighth Amendment claims against those respondents. Moreover, petitioner will be granted leave to proceed on his claims that respondents Tubbs, Westerhouse, Ourada and Sunde failed to train the other respondents because it is possible to infer that they had a duty to train the other respondents but failed to do so even though they knew that a constitutional violation was likely to occur without it.

In his complaint petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Samuel S. Upthegrove is a prisoner confined at the Waupun Correctional Institution in Waupun, Wisconsin. At times relevant to the complaint, petitioner was confined at Lincoln Hills School, a juvenile correctional facility located in Irma, Wisconsin.

Respondents are employees at the Lincoln Hills School: Paul Westerhouse is the superintendent; Mr. Ourada is the deputy superintendent; Bruce Sunde is the security director; Supervisor Brandt is a security supervisor; YC Kraft, YC Gerdes and John Does ##3-10 are youth counselors.

B. Cell Entry and its Aftermath

On March 19, 2005, respondents Brandt, Kraft, Gerdes and John Does ##3-10 were involved in a cell entry of petitioner's cell in the Roosevelt Security Cottage at the Lincoln Hills School. Some of the staff involved in the cell entry applied an "extreme" amount of downward pressure on petitioner's arms, slammed a metal door into him several times, untethered him, threw him into the corner of his cell with extreme force and kicked him in his legs. In addition, respondent Gerdes slammed petitioner's head into the wall and put his thumbs behind petitioner's ears and applied "extreme" pressure.

After the cell entry, respondent Gerdes made petitioner kneel facing the corner of his cell while naked for approximately 60 to 90 minutes and then sit on the metal bed frame. Petitioner filed a complaint about the incident, but respondent Sunde "coerced" petitioner into believing that no excessive force was used. Respondents Tubbs, Westerhouse, Ourada and Sunde failed to insure that the respondents involved in the cell entry were properly trained.

OPINION

A. Excessive Force

Petitioner contends that respondents Brandt, Kraft, Gerdes and John Does ##3-10 used excessive force on him in violation of his Eighth Amendment right to be free from cruel and unusual punishment. Under the Eighth Amendment, 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 refined this standard, explaining that the extent of injury inflicted was one factor to be considered, but 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.

In this case, petitioner alleges that during the cell entry respondent Gerdes slammed petitioner's head into the wall and put his thumbs behind petitioner's ears and applied "extreme" pressure and that "some of the staff" applied an "extreme" amount of downward pressure on petitioner's arms, slammed a metal door into petitioner several times, untethered him and threw him into the corner of his cell with extreme force and kicked him in the legs. Under the test set forth in Whitley, the circumstances of the prison officials' use of force is crucial. Petitioner's complaint is silent on his own behavior, and makes no suggestion as to why respondents were using force against him at all. If petitioner were resisting an order or physically assaulting himself, it would not raise constitutional concerns for prison officials to use pressure holds to gain control of the situation. However, even if petitioner's behavior provoked a response, it is difficult to imagine that the need for force required prison officials to slam petitioner into a metal door several times, throw him in a corner and kick him in the

legs. At this early stage, I must infer that the officials involved in the cell entry had no good reason for this kind of force.

The next question is which of the respondents who participated in the cell entry may be held liable for the alleged acts of excessive force. To recover damages from a respondent under § 1983, a petitioner must establish that a respondent was personally responsible for the deprivation of a constitutional right. Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994). If a state official does not directly deprive an individual of a constitutional right, at the very least he or she must (1) know about unconstitutional conduct and (2) facilitate it, approve it, condone it or turn a blind eye to it to satisfy the personal responsibility requirement of section 1983. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

In the present case, petitioner alleges that respondent Gerdes was directly involved in the alleged acts of excessive force. As for respondents Brandt, Kraft and John Does 3-10, petitioner simply identifies them as participating in the cell entry and suggests that some of them may have had a hand in the excessive force, alleging that "some of the staff" mishandled him. Petitioner's barebones allegations regarding the involvement of these respondents is sufficient to state a claim, if just barely. Although petitioner alleges only that "some" of them engaged in acts of excessive force, it is possible to infer that the others knew their colleagues were using excessive force and would have had a duty to intervene. Richman v. Sheahan, 512 F.3d 876, 884-85 (7th Cir. 2008) (deputies standing around looking while

person was "swarmed" by officers may be held liable because they had a duty to intervene as part of the "arresting force . . . awaiting a call to join the swarm should it become necessary"). Therefore, petitioner may proceed on his claim that respondents Brandt, Kraft, Gerdes and John Does ##3-10 used excessive force against him in violation of the Eighth Amendment.

B. Wanton Humiliation

Petitioner's next claim is that, following the alleged incident of excessive force, respondent Gerdes violated his Eighth Amendment rights by forcing him to kneel naked facing the corner of his wall for as long as 90 minutes. When prison officials treat a prisoner "in a manner designed to demean and humiliate" the prisoner, they may be liable under the Eighth Amendment for "wanton infliction of psychological pain." Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (prison guards conducting strip search in manner designed to demean and humiliate prisoner may be liable under Eighth Amendment). Of course, this does not mean a prisoner has an Eighth Amendment claim every time he is humiliated; to the extent that prison Gerdes may have had some legitimate purpose his actions, there would be no Eighth Amendment violation.

Nevertheless, at this early stage, I cannot assume that respondent Gerdes had a legitimate reason for subjecting petitioner to the humiliation of kneeling naked for 90

minutes facing the corner of his wall. Therefore, petitioner will be allowed to proceed on this claim against Gerdes.

C. Failure to Train

Next, petitioner alleges that respondents Tubbs, Westerhouse, Ourada and Sunde failed to properly train the respondents involved in the cell entry, which he alleges resulted in excessive force against him. The situations in which a failure to train may subject a government official to liability for a constitutional violation are quite limited. A supervisor may not be held liable simply because he had authority over someone else that violated a prisoner's constitutional rights. Rather, the supervisor's actions (or his failure to act) must help to cause the constitutional violation. Gentry, 65 F.3d at 561, that is, the official must have known that his training was inadequate to handle a particular situation and that a constitutional violation was likely without improvements. Kitzman- Kelley v. Warner, 203 F.3d 454 (7th Cir. 2000); Robles v. City of Fort Wayne, 113 F.3d 732 (7th Cir. 1997).

However, at the pleading stage, petitioner need only put respondents on notice of his claim to satisfy the pleading requirements of Fed. R. Civ. P. 8. Cf. Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998) (stating that allegation of "I was turned down a job because of my race" is enough to state race discrimination claim). At later stages of the litigation, petitioner will be required to show that: (a) respondents Tubbs, Westerhouse, Ourada and

Sunde were somehow responsible for ensuring the other respondents were trained; (b) they knew their failure to train properly was likely to lead to constitutional violations; and (c) they nonetheless provided inadequate training that contributed to the constitutional violation.

Although these possibilities appear unlikely, that is not a basis for rejecting this claim. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965-66 (2007) ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely"). Accordingly, I will allow petitioner to proceed on his claim that respondents Tubbs, Westerhouse, Ourada and Sunde failed to train respondents Brandt, Kraft, Gerdes and John Does ##3-10.

ORDER

IT IS ORDERED that

1. Petitioner Samuel S. Upthegrove's request for leave to proceed in forma pauperis is GRANTED with respect to his claims that:

a. respondents Brandt, Kraft, Gerdes and John Does ##3-10 used excessive force against him in violation of the Eighth Amendment;

b. respondent Gerdes violated his Eighth Amendment rights by forcing him to kneel naked facing the corner of his wall for as long as 90 minutes; and

c. respondents Tubbs, Westerhouse, Ourada and Sunde failed to train respondents Brandt, Kraft, Gerdes and John Does ##3-10.

2. 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 respondent or to respondent's attorney.

3. 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.

4. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Waupun Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

5. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint, the Rule 20 order severing petitioner's claims and this

order are being sent today to the Attorney General for service on the state respondents.

Entered this 17th day of November, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge