

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

RICHARD HOEFT,

Petitioner,

v.

DEB GIRARD,

Respondent.

ORDER

09-cv-118-bbc

This is the fifth of nine proposed civil actions for monetary relief brought under 42 U.S.C. § 1983 by petitioner Richard Hoeft. Petitioner asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to make even a partial pre-payment of the fee for filing this lawsuit. Therefore, I will screen his complaint.

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). However, because petitioner is requesting leave to proceed under the in forma pauperis statute, his complaint must be dismissed if it is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for

money damages. 28 U.S.C. § 1915(e)(2)(B). I conclude that petitioner has alleged facts from which it may be inferred that respondent Girard violated his First and Eighth Amendment rights when she used excessive force against him in retaliation for his filing a complaint about her behavior.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Richard Hoeft is a Wisconsin resident who was incarcerated at Flambeau Correctional Center during all times relevant to his allegations. Respondent Deb Girard is employed at Flambeau Correctional Center as a correctional officer.

B. The Incident

In the summer of 2008, petitioner was working in the gardens of the Flambeau Correction Center. After he witnessed respondent Girard brutally kill a wild animal for no reason, petitioner told her that he was going to report her. Girard told petitioner to mind his own business. After he witnessed Girard kill another animal, petitioner wrote a letter to the superintendent describing what he had observed.

In September 2008, Girard confronted petitioner and asked whether he was the one

that had reported her actions in the garden to the superintendent. Petitioner responded, “Maybe, maybe not. Serves you right. You shouldn’t have been killing off the wildlife around here.” Then, Girard grabbed petitioner, shoved him up against the wall and choked him. She said, “I asked you a question, you mother fucker. Are you the piece of shit that fucking told on me?” Petitioner responded, “Get your hands off me, you fucking lard ass.” Girard then pulled petitioner by the neck, slammed him against the wall again, threw him to the ground and kicked him in his upper thigh. She told him that if he told anybody what happened he would be sorry.

DISCUSSION

A. Excessive Force

_____ In determining whether an officer has used excessive force against a prisoner, the question is “whether 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

- ▶ 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 respondent Girard choked him, slammed him against the wall twice, threw him to the ground and kicked him in the upper thigh after he reported her actions to the prison superintendent. Assuming as I must that these allegations are true, petitioner may be able to prove that force was applied maliciously for the sole purpose of causing him harm. Accordingly, I will allow petitioner to proceed on his Eighth Amendment excessive force claim against respondent Girard.

B. Retaliation

I understand petitioner to further allege that respondent Girard assaulted him in retaliation for petitioner having filed a complaint against her with the superintendent of Flambeau Correctional Center. It is well settled that prison officials may not take adverse action against a prisoner for exercising a constitutional right. Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). It appears that petitioner's complaint about Girard's behavior

may be protected by the First Amendment because it is an inmate complaint or a grievance. Walker v. Thomson, 288 F.3d 1005, 1009 (7th Cir. 2002). Thus, petitioner's allegations that Girard assaulted him because he filed a grievance about her behavior in the gardens states a retaliation claim against respondent Girard.

ORDER

IT IS ORDERED that:

1. Petitioner Richard Hoeft's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondent Girard's use of force against him violated his Eighth Amendment rights;
2. Petitioner's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondent Girard retaliated against him for exercising his constitutional right to file a grievance about her behavior.
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 learns the name of the lawyer that will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner 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 he is unable

to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. Included with this order is one blank United States Marshals summons and service form. Petitioner must fill out the form for the respondent and return it to the court by April 28, 2009, so that respondents can be served with petitioner's complaint and this order. If, by April 28, 2009, petitioner fails to return the filled out summons and service forms he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice.

Entered this 6th day of April, 2009.

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