IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KEITH A. JURAK,

Plaintiff,

v.

DANE COUNTY JAIL DEPUTIES,
DEPUTY COSMOSKY,
DEPUTY VUE and
DEPUTY KEITH,

Defendants.

OPINION and ORDER

09-cv-419-bbc

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In this lawsuit brought pursuant to 42 U.S.C. § 1983, plaintiff Keith Jurak alleges that defendants violated his constitutional rights by using excessive force against him on October 24, 2008. Plaintiff has requested leave to proceed in forma pauperis and has paid the initial partial filing fee.

Because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if petitioner has had three or more lawsuits or appeals dismissed for lack of legal merit or 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)(2). However, petitioner

is also a pro se litigant, which means his complaint will be construed liberally as it is reviewed for these defects. Haines v. Kerner, 404 U.S. 519, 521 (1972).

I will grant plaintiff leave to proceed on his claim that defendant Cosmosky used excessive force against him when he choked plaintiff, threw him against the brick of wall of the jail and elbowed him in the eye because at this early stage it is possible to infer from the allegations that the amount of force defendant Cosmosky used was not necessary under the circumstances and was instead intended to cause plaintiff harm. However, I will deny plaintiff's request to proceed against defendants Vue and Keith because his complaint fails to implicate that they were personally involved in Cosmosky's use of excessive force.[1] Last, I will deny plaintiff's motion for appointment of counsel.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

In October 2008, plaintiff Keith Jurak was confined in the Dane County jail. On that day, respondents and deputies Trimble and Kalchinka were conducting a "shake down" of the cells on Block 704 because a spoon was missing after dinner. After respondent Cosmosky searched plaintiff's cell, plaintiff noticed that his cell had been treated differently

[1]Plaintiff included the phrase "Dane County Jail Deputies" in the caption of his complaint, but from his complaint it appears that he intends to bring claims only against deputies Cosmosky, Vue and Keith. Because I am denying plaintiff leave to proceed against Vue and Keith, I will amend the caption to reflect that plaintiff is granted leave to proceed only against Cosmosky.

from the others. Plaintiff requested a grievance form from Cosmosky, who refused to give him one In response, plaintiff yelled, "That's why the spoon is in my mattress bitch." Plaintiff told deputy Trimble that he did not have a spoon in his mattress but made the comment because Cosmosky denied him the grievance form.

Respondent Cosmosky and Trimble came to search plaintiff's cell again. Plaintiff requested that he be allowed out of his cell while it was searched. Cosmosky refused to let him out during the search. Plaintiff told Cosmosky, "You ain't coming in here while I'm in here, I don't feel safe." Cosmoksy instructed defendant Keith to open the cell door. While Keith began to open the door, plaintiff walked to the front of the cell with his hands behind his back, his chest forward and blocked the entry way to his cell. Cosmosky reached out, grabbed plaintiff around the neck, lifted him off the ground and threw him into the steel bed, causing plaintiff's head to slam against the brick wall. Cosmosky then choked plaintiff and elbowed him on the left side of his face, causing his vision to blur. Three to four officers entered plaintiff's cell and held him by his feet. By this point, plaintiff could taste blood in his mouth. He was handcuffed and escorted out of the cell.

After plaintiff was placed in cell block 717, he was seen by a nurse. He refused to show her his injuries but spit blood on the windows to show her he was bleeding. Plaintiff asked to have pictures taken of his injuries but the deputies refused. Later that evening, the nurse came to give plaintiff his medications. At this time, plaintiff showed her the cuts in

his mouth, the choke marks on his neck and the contusion on the back of his head. He asked to have his injuries documented but the nurse never did so.

OPINION

The Eighth Amendment prohibits "unnecessary and wanton inflictions of pain," which includes pain that is inflicted "totally without penological justification." Hope v. Pelzer, 536 U.S. 730, 737 (2001). For claims involving allegations of excessive force, the question is whether the defendant inflicted at least a minimal injury "maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillan, 503 U.S. 1, 6 (1992). As the Supreme Court explained in Whitley v. Albers, 475 U.S. 312, 321 (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.

In Hudson, 503 U.S. at 9-10, 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 officer used more than a minimal amount of force.

Under the test set forth in Whitley, the circumstances of the prison official's use of force is crucial. In his complaint, plaintiff alleges that defendant Cosmosky used excessive force against him by choking, slamming him against the cell bed and elbowing him in the face during a cell search on October 23, 2008. According to his complaint, the only action justifying Cosmosky's use of force was plaintiff's decision to block the entry into his cell by standing in the doorway. These actions alone do not provide a basis for defendant Cosmosky's alleged behavior. Plaintiff's complaint allows an inference to be drawn that defendant Cosmosky used more than minimal force and had no good reason for the force he used, instead applying it simply to cause plaintiff harm. Because the Eighth Amendment prohibits such wanton infliction of pain, plaintiff may proceed on his Eighth Amendment claim against defendant Cosmosky.

With respect to defendants Vue and Keith, the only allegations against these defendants is that defendant Keith opened plaintiff's cell door and defendant Vue saw the assault and covered up the blood. However, under § 1983, liability cannot attach to defendants Vue or Keith unless they "caused or participated in" the constitutional deprivation. Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994)). Plaintiff does not allege that defendants Vue or Keith used any force against him, encouraged or assisted defendant Cosmosky to use

force on plaintiff or knew Cosmosky was going to choke, slam or elbow plaintiff. Without more, the mere presence of Vue and Keith at the cell extraction fails to suggest that these defendants were personally involved in the use of excessive force against plaintiff. Because plaintiff's allegations fail to implicate defendants Vue and Keith in any violation of his constitutional rights, plaintiff's request to proceed against these defendants will be denied.

With respect to plaintiff's motion to appoint counsel, litigants in civil cases do not have a constitutional right to a lawyer; federal judges have discretion to determine whether appointment of counsel is appropriate in a particular case. Pruitt v. Mote, 503 F.3d 647, 654, 656 (7th Cir. 2007). In determining whether to appoint counsel, I must find first that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down. Plaintiff has not met this prerequisite. Moreover, even if it had been submitted properly, the motion is premature. Appointment of counsel is appropriate in those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the petitioner's demonstrated ability to prosecute it. Pruitt, 503 F.3d at 655. It is far too early to make that determination in this case. Accordingly, I will deny his motion without prejudice.

ORDER

IT IS ORDERED that:

1. Plaintiff Keith Jurak's request for leave to proceed in forma pauperis in this action is GRANTED as to his claim that defendant Cosmosky used excessive force against him in violation of the Eighth Amendment when he choked, slammed plaintiff's head into his steel bed and elbowed him in the face.

2. Plaintiff's request for leave to proceed in forma pauperis in this action is DENIED as to his claims against defendants Vue and Keith and his complaint is DISMISSED as to defendants Vue and Keith for failure to state a claim upon which relief may be granted.

3. A strike will be recorded against plaintiff pursuant to § 1915(g) because one or more claims has been dismissed for failure to state a claim upon which relief may be granted.

4. Plaintiff's motion for appointment of counsel, dkt. # 3, is DENIED.

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

6. 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.

7. Plaintiff 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 Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 19th day of August, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge