

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

OLIVER A. PENTINMAKI, JR.,

Plaintiff,

v.

Warden DEIDRE MORGAN,
Security Director THELEN,
Captain SPROELICH, Captain BUETTNER,
Lt. ALBERTS, Sgt. KELLY, Sgt. HAVENS,
Officer PAYNE, DEBRA LANCE,
Dr. EUGENE WALL, Dr. JANET WALSH,
Warden (Director) BYRAN BARTOW,
Deputy Director THOMAS SPEECH,
SCOTT BOEVERS, THERESA BARWELL,
STEVE SPANBAUER, Dr. GANNON and
RICK RAEMISCH,

Defendants.

ORDER

10-cv-194-slc¹

Plaintiff Oliver Pentinmaki has responded to the court's June 8, 2010 order in which I gave him two choices: (1) inform the court in writing that he wishes to proceed against defendants Albert and Payne on his claim for excessive force and dismiss his other claims

¹ I am assuming jurisdiction over the case for the purpose of this order.

without prejudice to filing them in a separate lawsuit; or (2) file an amended complaint that is limited to one set of defendants and one set of occurrences or series of occurrences and that describes the facts underlying each claim. Plaintiff chose the first option, so I will dismiss all of his claims except the excessive force claim. Plaintiff is free to pursue the other claims in a separate suit. (In fact, plaintiff has already filed several new lawsuits.)

Because plaintiff is a prisoner, I must screen his complaint to determine whether it states a claim upon which relief may be granted. 28 U.S.C. §§ 1915 and 1915A. With respect to his excessive force claim, plaintiff alleges that, in September 2009, defendant Lt. Alberts pushed him against the wall without provocation and then pushed him to the floor. Both defendant Alberts and defendant Payne “us[ed] the cuffed wrists of the Plaintiff to pull the Plaintiff’s arms from their sockets.” All the while Alberts and Payne were “being verbally abusive.”

In determining whether an officer has used excessive force against a prisoner in violation of the Eighth Amendment, 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; 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.

Plaintiff's allegations are sufficient to state a claim under this standard. Although his allegations could be more specific, he has given defendants Alberts and Payne enough factual information to give them notice of his claim. In addition, although plaintiff's allegations do not present the most obvious example of excessive force, I cannot say at this stage that the use of force was minimal as a matter of law. Accordingly, I will allow plaintiff to proceed on a claim defendants Alberts and Payne used excessive force against him.

Plaintiff should be aware that he will need to come forward with more specific evidence at trial or in response to a motion for summary judgment. For example, plaintiff will need to submit sworn testimony, medical records or other admissible evidence addressing each of the factors set forth in Whitley. If he simply repeats the allegations in his complaint, he will not survive a motion for summary judgment under Fed. R. Civ. P. 56

or a motion for judgment as a matter of law under Fed. R. Civ. P. 50. Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) (“The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.”); Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998) (“Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.”).

ORDER

IT IS ORDERED that

1. Plaintiff Oliver Pentinmaki is GRANTED leave to proceed on his claim that defendants Alberts and Payne used excessive force against him, in violation of the Eighth Amendment.
2. The complaint is DISMISSED WITHOUT PREJUDICE as to all other remaining claims and defendants.
3. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the

court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff 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 documents.

5. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

6. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for

defendants.

Entered this 25th day of June, 2010.

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