

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

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LAMONT D. WALKER,

Plaintiff,

v.

OPINION AND ORDER

RYAN ARMSON, JAMES KOTTKA,  
LIEUTENANT KELLER, DYLOM RADTKE,  
DALIA SULIENE and JANEL NICKEL.

10-cv-313-slc

Defendants.

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In this lawsuit brought pursuant to 42 U.S.C. § 1983, plaintiff Lamomt D. Walker is proceeding on his claims that: (1) defendants Ryan Armson, James Kotka, Lieutenant Keller, Dylan Radtke, Dalia Suliene and Janel Nickel were deliberately indifferent to his serious medical need; (2) defendants Keller and Nickel subjected him to excessive force; and (3) defendants Keller and Nickel subjected him to conditions of confinement that constituted cruel and unusual punishment. Before the court are plaintiff's motion for summary judgment, dkt. 54, and defendants' cross motion for summary judgment, dkt. 67.

Although as defendants point out, plaintiff did not comply with this court's procedures for opposing defendants' motion for summary judgment, plaintiff's affidavit in support of his motion for summary judgment creates a genuine issue of material fact on plaintiff's claim that defendants Armson and Kottka were deliberately indifferent to his serious medical need. Therefore, I will deny Armson and Kottka's motion for summary judgment on this claim. Because there is no genuine issue of material fact as to plaintiff's other two claims, they can be decided as a matter of law in defendants' favor.

The following material facts are undisputed for the purpose of deciding the motions for summary judgment:

## UNDISPUTED FACTS

At the times relevant to his lawsuit, plaintiff Lamont D. Walker was incarcerated at the Columbia Correctional Institution (CCI) in Portage, Wisconsin. Defendants Ryan Armson, James Kottka, Lieutenant Keller, Dylan Radtke, Dalia Suliene, and Janel Nickel are employed at the Columbia Correctional Institution. Armson and Kottka are correctional officers. Keller and Radtke are correctional supervisors. Dr. Suliene is a physician. Nickel is the security director.

On July 7, 2009, Walker was incarcerated in the segregation unit of the Columbia Correctional Institution. Defendant Keller was informed by staff in the unit that Walker had flooded his cell, covered his cell window and was ignoring orders to uncover his cell window. Keller also was informed that Walker had been covering and uncovering his cell window earlier in the day. Keller went to Cell 34 and talked to Walker through the door, but Walker sounded agitated and refused to uncover his window. As a result, Keller informed Walker that he was being placed in control status. Walker refused a direction to put his hands through the upper door trap to be restrained.

Keller notified Radtke, who authorized the use of a cell extraction team and the use of incapacitating agents and electronic control devices if necessary to remove Walker from his cell. Also, Keller consulted Dr. Suliene to obtain medical clearance for the use of Oleoresin Capsicum (OC) spray (also known as pepper spray) and electronic devices. Dr. Suliene knew that plaintiff had asthma; in her opinion, OC could be safely used on persons with asthma and it could be used safely on Walker. Dr. Suliene based her conclusion on her medical training and her experience as a physician. Further, she was unaware of any empirical studies suggesting it was necessary to prohibit the use of OC spray on individuals diagnosed with asthma.

An audiovisual recording of the subsequent cell extraction confirms the events described in defendants' affidavits. *See* Dkt. 70, Exh. A. The recording is by far the clearest and most complete representation of what actually occurred and the court adopts what is seen and heard on the recording as uncontested facts. By way of synopsis, Walker, who was listed in prison records as 5'11" tall and 236 pounds, had flooded his cell and blocked the door trap and window with his mattress and sheets. CCI needed to move Walker out of the cell and into a different disciplinary cell. Walker refused to leave, or even to remove his bedding from the cell door.

Keller mustered a four-officer team to extract Walker from his cell. Before employing the team, Keller tried to persuade Walker to comply with orders to clear his door and present himself properly for transport to a disciplinary cell. Walker refused. Keller told Walker that he would give Walker a few minutes to think about complying and left the area (the videographer remained; at one point, Walker peeked out of his cell window to see where everyone went). Next, a CCI social worker or psychologist came to the cell door and unsuccessfully attempted to persuade Walker to comply with orders.

Several minutes later the extraction team returned and Keller again directed Walker to unblock his door and present himself for transport. Walker again refused. Team members then cleared blockage from the floor-level small trapdoor into the cell and Keller shot one burst of OC spray into Walker's cell. Walker did not immediately capitulate, so the extraction team waited for the OC to take effect. Not quite three minutes later, Walker removed the cover from his window and placed his hands out of the upper door trap to be restrained. After officers applied the restraints, they opened the cell door and directed Walker to step out backwards. Walker briefly acted as if he could not stand; team members thought Walker was intentionally flopping in order to make it harder for them to apply leg restraints.

As shown on the recording's time clock, for not quite one minute, Walker hyperventilated and gasped for air; less than two minutes later, he was walking normally to the shower and breathing with minimal visible distress; within two more minutes (that is, about seven minutes after he was first exposed to OC spray in his cell), Walker was yelling at and berating the guards while they showered him and strip-searched him. Walker showed no signs of breathing difficulties in the shower. Nurse Ketarkus observed Walker while he was in the shower and concluded that he was in good medical condition.

Team members escorted Walker to a nearby disciplinary cell (No. 45), tethered him to the door and removed his leg restraints. As team members placed Walker in the cell, he turned to face them, attempted to step out of the cell, then kicked an officer in the thigh before the officers were able to push him into the cell and lock the door. This was ten minutes after Walker had been exposed to OC spray. Walker refused to place his hands out of the door trap so that his restraints could be removed. Eventually, the officers were able to retrieve Walker's hands and remove the restraints, but Walker refused to place his hands back in the cell. Keller told Walker he would use an electronic shock device if Walker did not pull his hands back into the cell. Walker pulled his hands inside of the cell. Walker showed no signs of breathing difficulty during any of this.

The average temperature of Cell 45 from July 7, 2009 at 4:00 p.m. (when Walker was placed there) and July 8, 2009 at 9:28 p.m. (when Walker received a smock and mat) was 76.5 degrees Fahrenheit.

## DISPUTED FACTS

Walker asserts in his affidavit that prior to the incident on July 7, 2009 he asked defendants Armson and Kottka for his asthma inhaler because he was having trouble breathing. Defendants Armson and Kottka deny that Walker asked for his inhaler or that he was having trouble breathing. Both officers state in their affidavits that the inhaler was in a box at the side of Walker's cell door and that they would have given it to him if he had asked for it. (The video recording of Walker's cell extraction, dkt. 70, exh. A, shows that Walker's inhaler was in a wire mesh basket at eye level to the right of Walker's cell door.)

Walker asserts that he suffered an asthma attack after he was sprayed with OC spray. Defendants deny that Walker had an asthma attack, although they state that he acted like he was having breathing problems when he first came out of the cell. The video recording confirms that Walker's breathing was distressed as he staggered out of the cell, but Walker quickly returned to normal, having the ability to draw sufficient oxygen into his lungs to harangue the guards while they showered him.

Finally, Walker asserts that Cell 45 was cold, infested with ants and had rust on the bed. Keller asserts that it was his normal practice to observe the cell before placing an inmate in the cell. He did not observe any unusual conditions in Cell 45 when he placed Walker in Cell 45. Defendants assert that if these conditions had been reported they would have been fixed and that the cells are regularly inspected. However, the cell extraction video shows some of the interior of Cell 45, and the bed frame appears rusty.

## OPINION

### A. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). “A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.” *Sides v. City of Champaign*, 496 F.3d 820, 826 (7<sup>th</sup> Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7<sup>th</sup> Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7<sup>th</sup> Cir. 2007). Even so, the nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

### B. Excessive Force

Plaintiff claims that defendants Keller and Nickel subjected him to excessive force on July 7, 2009. In the context of prison, excessive force claims arise under the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. 1 (1992). The Eighth Amendment prohibits conditions of confinement that “involve the wanton and unnecessary infliction of pain.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Because prison officials sometimes must use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force “was applied in a good-faith effort to maintain or

restore discipline, or maliciously and sadistically to cause harm.” *Hudson*, 503 U.S. at 6-7. To determine whether force was used appropriately, a court considers the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. *Whitley*, 475 U.S. at 321; *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7<sup>th</sup> Cir. 2001). In *Hudson*, 503 U.S. at 9-10, the Court explained that while the extent of injury inflicted was one factor to be considered, the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than minimally necessary amount of force.

Perhaps not surprisingly, prisoner excessive force claims often present swearing contests, with the plaintiff averring that the defendants used excessive force and the defendants swearing in response that they did not. More often than not, a trial is needed so that a jury can determine who is telling the truth. *See, e.g., Lewis v. Downey*, 581 F.3d 467, 476 77 (7<sup>th</sup> Cir. 2009). Where, however, there is objective evidence of what occurred in the form of a video recording, it might be possible for the court to determine that there is no *genuine* dispute of fact because the video supports one version of events and discredits the other. So it is here.

Walker’s version of events does not even directly raise a claim of excessive force. He asserts in his affidavit that when Keller threatened to use OC spray if Walker didn’t comply with directions, Walker advised Keller that Walker was asthmatic, which meant that Keller could not use the OC spray; Keller replied that he had checked with Dr. Suliene, who had said that nothing would happen and that it was okay to use chemical agents on Walker. Walker’s affidavit then skips ahead in the narrative, asserting next that “plaintiff was exposed to the

OC/CS agents which caused me to have an asthma attack.” Affidavit of Lamont D. Walker, dkt. 59, at ¶¶ 7 & 8. Apparently Walker’s view is that, regardless of how provocative and violent his resistance, the use of OC spray on a known asthmatic is excessive force as a matter of law, even if a physician has cleared the use of OC spray.

It is not a per se constitutional violation for prison officials to use chemical agents to subdue a resisting inmate. It is a constitutional violation for prison officials to use chemical agents in quantities greater than necessary, or for the sole purpose of punishment or the infliction of pain. Whether the use of OC spray in a particular situation was appropriate must be determined by the facts and circumstances of the case. *Soto v. Dickey*, 744 F.2d 1260, 1267-68, 1270 -71 (7th Cir. 1984); *see also Lewis*, 581 F.3d at 475-76 (*appropriate* use of non-lethal, hands-off means play an important role in maintaining discipline and order within prisons); *cf. Danley v. Allen*, 540 F.3d 1298, 1311 (11<sup>th</sup> Cir. 2008)(usually, pepper spray does not create a serious medical need because it causes only temporary discomfort, the appropriate remedy for which is merely a shower).

Defendants swear that they did not use excessive force and have submitted a video recording of the cell extraction which provides objective support for their version of events. *See* dkt. 70, Exh. A. The video shows that the defendants used minimal force to subdue and extract Walker, and that this force was reasonably applied in response to Walker’s tenacious resistance to verbal requests and commands.

The only wild card is Walker’s asthma, and Walker plays it as a trump card, essentially asserting that prison officials were barred from using chemical sprays on him. Although this assertion has some initial appeal, Walker has not backed it up with any testimony from a

medical expert. It's just his say-so, and it's palpably self-serving for Walker to contend that no matter how violent and resistant he becomes, prison staff have no alternative but to engage him in hand-to-hand combat to subdue him.<sup>1</sup>

In response, defendants have presented the expert opinion of Dr. Suliene, who opines that OC spray is *not* contraindicated on an asthmatic. She bases her opinion on her medical training (she has been a physician since 1975), her experience as a correctional system physician (5½ years as the physician at CCI), her knowledge of the literature (there are no empirical studies supporting Walker's assertion) and her view of the video recording of Walker's cell extraction (he exhibits no signs or symptoms of asthma—as distinct from the usual and expected respiratory irritation—after being exposed to OC spray). *See* dkt. 75. Additionally, the video establishes that Walker briefly was in apparent respiratory distress, he quickly recovered and within about seven minutes was breathing well enough to cuss the guards with gusto.

So, there is no factual or legal support for Walker's position that the defendants' use of OC spray on a known asthmatic, standing alone, entitles him to a trial on his claim of excessive force. Backing out a step to consider all of the material facts, it is sufficiently clear that there is no genuine factual dispute that requires a jury Walker's claim of excessive force. The defendants are entitled to judgment as a matter of law.

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<sup>1</sup> There is some indication in the record that Walker also believed that by flooding his cell, he had neutralized the extraction team's ability to use a taser to subdue him.

### C. Eighth Amendment Claims

#### 1. Deliberate Indifference to Serious Medical Need

Plaintiff claims that defendants Ryan Armson, James Kotka, Lieutenant Keller, Dylon Radtke, Dalia Suliene and Janel Nickel were deliberately indifferent to his asthmatic condition. The Eighth Amendment prohibits prison officials from acting with deliberate indifference to prisoners' serious medical needs or suffering. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). "Serious medical needs" include (1) conditions that are life-threatening or that carry risk of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and/or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73. (7th Cir. 1997) A prison official acts with deliberate indifference if he or she "knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk." *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002)).

##### a. Denial of Asthma Inhaler

Here, Walker asserts that he asked defendants Armson and Kottka for his asthma inhaler because he was having trouble breathing but they wouldn't give it to him. Both defendants deny that Walker was having breathing problems or had an inhaler. This dispute is material to whether these defendants were deliberately indifferent to his serious medical need of asthma. Defendants contend that Walker's version of the events is discredited by the record. They argue that the fact that the inhaler was in a basket hanging next to Walker's cell door means they

would have given it to him if he had asked. This argument is a non sequitur: Walker is claiming that Armson and Kottka intentionally declined to honor his request for his inhaler; if this really was their intent, then it would not matter how handy the inhaler was, because they weren't going to give to Walker anyway. In deciding a summary judgment motion, the court is prohibited from making credibility determinations and choosing between competing versions of the material facts.

Armson and Kottka argue that they are entitled to qualified immunity if their conduct did not violate clearly establish statutory or constitutional rights according to *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That's an accurate statement of the law, but it's another non sequitur: Walker is claiming that Kottka and Armson deliberately refused to provide him with his asthma inhaler when he asked for it. This means that they are not be entitled to qualified immunity because the Eighth Amendment right to be free from deliberate indifference to a serious medical need was clearly established. *Estelle*, 429 U.S. at 103. Therefore, defendant Armson and Kottka cannot obtain summary judgment on Walker's claim that they denied him his asthma inhaler when he was having observable breathing problems.

b. Use of OC spray during the cell extraction

Walker puts an Eighth Amendment spin on his cell extraction, claiming that defendant Keller was deliberately indifferent to his asthma when Keller shot a burst of OC spray into Walker's cell when Walker repeatedly refused direct orders to present himself for transport. But Keller was not indifferent to Walker's medical condition, he was appropriately sensitive to it. Keller knew that Walker was an asthmatic, so before beginning the cell extraction, he made a

point to ask Dr. Suliene whether OC spray could be safely used on Walker. Dr. Suliene, who also knew that Walker was an asthmatic, told Keller that this was medically acceptable.

Therefore, Keller's actions do not constitute deliberate indifference to any risk to Walker's health. He did exactly what he was supposed to do: he checked with a medical professional to determine if it was safe to proceed in a certain fashion and acted in accordance with the advice he received. *See Berry v. Peterman*, 604 F. 3d 435, 440 (7th Cir. 2010)(non-medical security and administrative personnel at jails and prison are encouraged to defer to the professional medical judgments of the prison's physicians).

Also, Walker claims that defendants Suliene and Nickel were deliberately indifferent to his asthma when they allowed Keller to spray him with OC spray. However, as discussed above, defendant Suliene made a decision based on her medical training and experience that the use of OC spray on plaintiff would not harm him. Walker's disagreement with this decision, unsupported by any medical evidence, does not support a deliberate indifference claim. *Edwards v. Snyder*, 478 F. 3d 827, 831 (7th Cir. 2007). Because Walker has not alleged that Nickel was personally involved in the decision to spray Walker with OC spray, she cannot be found to be deliberately indifferent to his serious medical need. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

In sum, the court will grant summary judgment to defendants Keller, Suliene and Nickel on this claim.

## 2. Conditions of Confinement.

Plaintiff claims that defendants Keller and Nickel subjected him to conditions of confinement that violated his Eighth Amendment rights. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To constitute cruel and unusual punishment, conditions of confinement must be extreme. General "lack of due care" by prison officials will never rise to the level of an Eighth Amendment violation because "it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley*, 475 U.S. at 319.

To demonstrate that prison conditions violated the Eighth Amendment, a plaintiff must allege facts that satisfy a test involving both an objective and subjective component. *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994). The objective analysis focuses on whether prison conditions were sufficiently serious so that "a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities," *Farmer*, 511 U.S. at 834, or "exceeded contemporary bounds of decency of a mature, civilized society." *Lunsford*, 17 F.3d at 1579. The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to plaintiff. *Id.*

Walker asserts that Cell 45 was cold, ant-infested and had a rusty bed frame. Defendants have submitted uncontradicted objective evidence that the cell was warm. It remains disputed whether Cell 45 was ant-infested and had a rusty bed frame. But even if the cell had ants in it and the bed frame was rusty, where is the constitutionally cruel and unusual punishment?

Walker has submitted no evidence that these conditions posed a serious harm to him, or for that matter, that defendant Keller or Nickel were deliberately indifferent to any risk of serious harm that might have been posed by either of these conditions. Defendants Keller and Nickel are entitled to judgment in their favor on this claim and their motion for summary judgment will be granted.

#### ORDER

IT IS ORDERED that:

1. Plaintiff Lamont Walker's motion for summary judgment, dkt. 54, is DENIED.
2. Defendants Armson and Kottka motion for summary judgment on plaintiff's Eight Amendment claim that they denied him his asthma inhaler when he was having breathing problems is DENIED.
3. In all other respects, defendants' motion for summary judgment, dkt. 67, is GRANTED.

Entered this 22<sup>nd</sup> day of June, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge