IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES R. SCHULTZ,

OPINION AND ORDER

Plaintiff,

10-cv-581-bbc

v.

Warden PUGH, Security Director RICHARDSON,
Captain KASTEN, Correctional Officer ERIC JOHNSON,
Correctional Officer JOHN SEVERSON,
Correctional Officer DeMars, Unit Manager SWEENEY,
Ms. MAGUIRE-PETKE, UNIVERSITY HOSPITALS,
JOHN DOE NO.1 and JOHN DOE NO. 2,

Defendants.

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Plaintiff James R. Schultz is a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin. He alleges that various prison officials violated his rights under federal, state and international law. 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(e)(2). Plaintiff has filed an original complaint and an amended complaint. Because defendants have not yet filed an answer, plaintiff has a right to amend his complaint once without leave of court. Fed. R. Civ. P. 15(a)(1). Accordingly, I will disregard the original complaint and screen the amended complaint. Massey v. Helman, 196 F.3d 727, 735 (7th

Cir. 1999) ("[W]hen a plaintiff files an amended complaint, the new complaint supersedes all previous complaints and controls the case from that point forward.")

I conclude that plaintiff may proceed on the following claims: (1) defendants Johnson and Severson used excessive force against him, in violation of the Eighth Amendment; (2) defendants DeMars, Richardson, and Kasten disciplined plaintiff for discussing Johnson's and Severson's use of force, in violation of the First Amendment; (3) defendants Kasten and Pugh have ordered plaintiff to refrain from speaking about the use of force, in violation of the First Amendment; and (4) defendant Richardson refuses to allow plaintiff to use an ambulatory aid, in violation of the Americans with Disabilities Act and the Eighth Amendment. The complaint will be dismissed as to all other claims and defendants.

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). In his complaint, plaintiff fairly alleges the following facts.

ALLEGATIONS OF FACT

In 2005, defendants Eric Johnson and John Severson, two correctional officers, transported plaintiff to the University of Wisconsin Hospital for back surgery and then "physically assaulted" him while he was under anesthesia. After plaintiff returned to the prison and bruises appeared "from his neck to his knee down one side of his back," John Doe

Nos. 1 and 2 "led [plaintiff] to believe the bruising could not have been caused from the surgery."

In July 2009, after plaintiff saw defendants Severson and Johnson on the recreation field, plaintiff informed defendant DeMars, another correctional officer, of what Severson and Johnson had done. As a result, plaintiff was given a conduct report and placed in segregation for lying about staff. Defendant Richardson, the security director, issued the conduct report. Defendant Kasten, a captain, found plaintiff guilty of the conduct report. As part of the disposition, Kasten ordered plaintiff not to speak about "the conduct report or the incident." While plaintiff was in segregation, defendant Richardson refused to provide plaintiff's "prescribed medical appliances," such as a walker and a cane. Plaintiff cannot walk without a cane or other ambulatory aid and cannot participate in outdoor recreation.

Plaintiff asked his unit manager, defendant Sweeney, for a transfer to another prison because he is afraid of defendants Severson and Johnson. Sweeney said that he "would look into the matter," but plaintiff has not heard back from him.

Plaintiff complained to defendant Pugh, the warden, about the conduct report. Pugh said that plaintiff was "in violation of the conduct report's disposition."

Later, plaintiff received another conduct report "for using his title as Special Agent in Piety Global International, Inc., for his investigations (religious) into corruption in

government—i.e. misappropriation of funds, etc."

OPINION

A. Excessive Force: Defendants Johnson and Severson

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
- 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, plaintiff alleges that defendants Johnson and Severson "physically assaulted" him while he was in the hospital. Although he does not identify exactly what Johnson and Severson did, he does say that he suffered a significant amount of bruising. At this early stage, I will assume that the bruising was caused by Johnson and Severson rather than the back surgery. However, at summary judgment or trial, plaintiff will have to identify with specificity what Johnson and Severson did, what evidence he has that Johnson and Severson used force against him (particularly if plaintiff was unconscious when the alleged assault occurred) and what evidence he has that Johnson and Severason caused his injuries.

B. Free Speech: Defendants DeMars, Richardson, Kasten and Pugh

I understand plaintiff to be alleging that defendants DeMars, Richardson and Kasten retaliated against him for discussing the alleged assault by issuing him a conduct report, placing him in segregation and finding him guilty of telling lies about staff. In addition, plaintiff alleges that defendants Kasten and Pugh are continuing to violate his First Amendment rights by prohibiting him from talking about the alleged assault. These allegations are sufficient to state a claim upon which relief may be granted. Prison officials may not retaliate against a prisoner for exercising a constitutional right. Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). Plaintiff has the right to complain about prison conditions under the free speech clause, at least when the speech does not undermine a

legitimate penological interest of prison officials. Watkins v. Kasper, 599 F.3d 791, 796-97 (7th Cir. 2010). Along the same lines, officials may not impose a prior restraint on a prisoner unless doing so is reasonably related to a legitimate penological interest.

Plaintiff should know that he will not be able to stand on his allegations at later stages in the case. To prove his claims at summary judgment or trial, he will have to come forward with specific facts showing that a reasonable jury could find in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Fed. R. Civ P. 56. A claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many prisoners make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove his claim with the allegations in his complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

Plaintiff will have to come forward with *evidence* either at summary judgment or at trial that defendants disciplined him because of the exercise of his constitutional rights. In particular, plaintiff will have to show not only that he is telling the truth about defendants Johnson and Severson, but that defendants DeMars, Richardson and Kasten *know* that plaintiff is telling the truth, and were personally involved in punishing him anyway. Wilson v. Greetan, 571 F. Supp. 2d 948, 955 (W.D. Wis. 2007). It will not be enough for plaintiff to show that defendants DeMars, Richardson and Kasten acted foolishly or by mistake in

disciplining plaintiff. Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006). If DeMars, Richardson and Kasten honestly believed that plaintiff's allegations against Johnson and Severson are fabricated, his claim for retaliation will fail.

Plaintiff includes an allegation that he received another conduct report "for using his title as Special Agent in Piety Global International, Inc., for his investigations (religious) into corruption in government—i.e. misappropriation of funds, etc." It is not clear what plaintiff means by this. To the extent he means to identify another alleged instance of retaliation, I cannot allow him to proceed on this claim because he does not allege that any of the defendants were responsible for it.

C. Failure to Accommodate a Disability: Defendant Kasten

Plaintiff alleges that he needs a cane or walker in order to walk, but defendant Kasten has refused to provide one, in violation of the Americans with Disabilities Act. Title II of the ADA states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. State prisons are considered public entities under the ADA. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 210 (1998) (citing 42 U.S.C. § 12131(1)(B)). Although plaintiff did not name "a public entity" such as the Wisconsin Department of Corrections as a defendant, he may sue individuals in

their official capacity for injunctive relief under Title II. Bruggeman ex rel. Bruggeman v. Blagojevich, 324 F.3d 906, 912-13 (7th Cir. 2003).

A person is disabled under the ADA if he has a "physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). In general, being "substantially limited" means that "a person must be 'either unable to perform a major life function, or [be] significantly restricted in the duration, manner, or condition under which the [person] can perform a particular major life activity, as compared to the average person in the general population.'" Peters v. City of Mauston, 311 F.3d 835, 843 (7th Cir. 2002) (alterations in original) (quoting Contreras v. Suncast Corp., 237 F.3d 756, 762 (7th Cir. 2001)). A person is "qualified" if he is able to participate in the program, activity or service with a reasonable accommodation. 42 U.S.C. § 12131(2). A reasonable accommodation must be effective in allowing the plaintiff to participate, but prison officials are not obligated to provide whatever accommodation a prisoner requests. Mobley v. Allstate Insurance, 531 F.3d 539, 546-47 (7th Cir. 2008).

"Walking" is a major life activity under the statute. Turner v. The Saloon, Ltd., 595 F.3d 679, 689 (7th Cir. 2010); Brunker v. Schwan's Home Service, Inc., 583 F.3d 1004, 1008 (7th Cir. 2009). For the purpose of screening, it is reasonable to infer that: (1) plaintiff is "substantially limited" in his ability to walk; and (2) outdoor recreation is a "service," "program" or "activity" of the prison. At summary judgment or trial, plaintiff will

have to prove both that he is substantially limited in a major life activity and that the ambulatory aid is a reasonable accommodation. Mobley, 531 F.3d at 547. If plaintiff believes that he has been denied access to any particular "program," "service" or "activity" other than outdoor recreation because of his walking impairment, he should file a supplement to his complaint.

Plaintiff may proceed on a claim under the Eighth Amendment as well. A prison official may violate a prisoner's right to medical care under the Eighth Amendment if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir.1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir.1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Does plaintiff need medical treatment?

(2) Do defendants know that plaintiff needs treatment?

(3) Despite their awareness of the need, are defendants failing to take reasonable measures to provide the necessary treatment?

Plaintiff's allegation that he is unable to walk without an ambulatory aid and that defendant Richardson refuses to provide such an aid is sufficient to state a claim upon which relief may be granted at the pleading stage. At summary judgment or at trial, it will not be enough for plaintiff to show that he disagrees with Richardson's conclusion about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that an ambulatory aid might be beneficial. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff will have to show that any medical judgment by defendants is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted).

D. Other Defendants

The remaining defendants are Sweeney (the unit manager), Maguire-Petke (the "business manager" for the prison), "University Hospitals" and John Doe Nos. 1 and 2. Plaintiff cannot proceed against defendants "University Hospitals" or "Ms. Maguire-Petke"

because his amended complaint does not include any allegations suggesting that either defendant did anything wrong. In fact, he says nothing about Maguire-Petke except that she is the business manager.

Plaintiff's only allegation against John Doe Nos. 1 and 2 is that they "led [plaintiff] to believe the bruising could not have been caused from the surgery." It is not clear why plaintiff believes that these unnamed officers have violated his rights. If plaintiff meant what he said in this allegation, these officers simply agreed with plaintiff's belief that his bruises were not caused by the surgery. Even if plaintiff meant to allege that John Doe Nos. 1 and 2 knew that Johnson and Severson caused plaintiff's injuries but they lied and said that they were a result of the surgery, I am not aware of any federal cause of action for lying in this context.

Plaintiff's only allegation against defendant Sweeney is that he failed to act on plaintiff's request for a transfer to another prisoner. Again, it is not clear why plaintiff is suing Sweeney, but it may be that plaintiff believes Sweeney may be held liable for subjecting him to a substantial risk of serious harm, in violation of the Eighth Amendment. Farmer, 511 U.S. 825. The problem with such a claim is that plaintiff includes no allegations in his complaint suggesting that safety requires a transfer or that defendants Johnson and Severson remain a danger to him, even if his allegations about the assault are true. Plaintiff does not allege that Johnson and Severson have threatened or intimidated him in any way at the

Stanley prison or that anything about their actions in 2005 suggest an ongoing vendetta. Accordingly, the complaint will be dismissed as to defendants Maguire-Petke, Sweeney, University Hospitals and John Doe Nos. 1 and 2.

E. Other Legal Theories

In addition to the claims identified above, plaintiff cites a laundry list of statutes and treaties that he believes defendants violated, including the Vienna Convention, the Religious Land Use and Institutionalized Persons Act, the Racketeer Influenced and Corrupt Organization Act (and Wisconsin counterpart to that act) and various criminal statutes. I will not allow plaintiff to proceed under any of these theories at this time.

As I explained to plaintiff in a previous opinion, private litigants may not file civil lawsuits under criminal laws. United States v. Batchelder, 442 U.S. 114, 124 (1979). Generally, treaties made by the United States cannot be enforced by private parties unless they are "implemented by appropriate legislation" or "are intended to be self-executing." Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985). Even if I assume that any of the treaties plaintiff identifies are enforceable, he fails to identify why he believes defendants have violated a particular provision. The same is true of the other statutes plaintiff cites. I do not see any basis in his complaint for a claim that defendants are violating his religious rights or are engaging in racketeering. If plaintiff believes that he

has claims under any of these laws, he must explain the basis for his belief and show that the particular law is enforceable by a private party in federal court.

F. Note on § 1915(g)

Under 28 U.S.C. § 1915(g), a prisoner may not proceed in forma pauperis when he "has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." In other words, § 1915(g) is a "three strikes and you're out" provision. For many years, I interpreted § 1915(g) to mean that a prisoner did not receive a "strike" unless an entire lawsuit was dismissed for one of the reasons stated in the statute. For example, in Zach v. Stacey, 2007 WL 3165738, *4 (W.D. Wis. 2007), I stated:

> 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." Because I am dismissing one of plaintiff's claims on the ground that this court lacks subject matter jurisdiction, and not for one of the reasons enumerated in 1915(g), a strike will not be recorded against him under § 1915(g).

See also Ferguson v. Pulver, 2006 WL 2289212, *4 (W.D. Wis. 2006); DeKalb v. State of Wisconsin, 2005 WL 2740926, *2 (W.D. Wis. 2005); Faulkner v. Litschner, 2004 WL

1688199, *2 (W.D. Wis. 2004); Keys v. Semler, 2001 WL 34381110, *3 (W.D. Wis. 2001).

In George v. Smith, 507 F.3d 605 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit seemed to take a different view: "When a prisoner does file a multi-claim, multi-defendant suit, the district court should evaluate each *claim* for the purpose of § 1915(g)." (emphasis added). After George, I assessed a strike in any prisoner case in which I dismissed one or more claims for failure to state a claim upon which relief may be granted. E.g., Uhde v. Wallace, 2008 WL 4643351, *9 (W.D. Wis. 2008) ("Under George v. Smith, 507 F.3d 605 (7th Cir. 2007), a strike is counted for the purpose of barring prisoners from seeking pauper status under 28 U.S.C. § 1915(g) for any case in which any claim is dismissed as legally meritless or failing to state a claim upon which relief may be granted."). Many other district courts in this circuit adopted the same approach. E.g., Jackson v. Gaetz, 2010 WL 3894010, *2 (S.D. Ill. 2010); Lemon v. Joyce, 2010 WL 3168311, 4-5 (N.D. Ill. 2010); Hughes v. Correctional Medical Services, 2008 WL 4099259, *1 (N.D. Ind. 2008); Tate v. Frank, 2007 WL 4561117, *1 (E.D. Wis. 2007).

On October 14, 2010, the Court of Appeals for the Seventh Circuit issued an opinion in Turley v. Gaetz, 09-3847, in which the court stated that George did *not* require district courts to assess strikes anytime a single claim was dismissed. Rather, the court stated that "a strike is incurred under § 1915(g) when an inmate's case is dismissed *in its entirety* based

on the grounds listed in § 1915(g)." However, the next day, the court withdrew the October 14 opinion and stated that the appeal "remains under advisement."

Until Turley is resolved, the rule in this circuit regarding assessment of strikes remains unclear. That could raise a problem in this case because I am dismissing several claims and defendants. Such a partial dismissal would require a strike under my interpretation of George, but not under Turley.

Fortunately, it is unnecessary to resolve the potential conflict in this case because I conclude that a strike should not be assessed regardless whether George or Turley provides the appropriate rule. In previous cases, I have treated removed cases in the same way I treated those filed originally in this court for the purpose of § 1915(g). Fandrich v. Raemisch, 2009 WL 62152, *3 (W.D. Wis. 2009); Olmsted v. Horner, 2008 WL 4104007, *8 (W.D. Wis. 2008). However, as two commentators recently observed, § 1915(g) applies only when a prisoner has "brought" claims in federal court that are dismissed. In this case, plaintiff brought the action to state court; it was defendants who brought the action to federal court by removing it. This suggests that § 1915(g) does not apply to actions that have been removed. John Boston and Daniel E. Manville, Prisoners' Self-Help Litigation Manual 553 (4th ed. 2010). I find these comments persuasive. Accordingly, I conclude that it was error to assess strikes in cases such as Fanrich and Olmsted and that strikes should not be assessed in the future in cases that were removed by defendants to federal court.

ORDER

IT IS ORDERED that

1. Plaintiff James Schultz is GRANTED leave to proceed on the following claims:

(a) defendants Johnson and Severson used excessive force against plaintiff, in violation of the Eighth Amendment;

(b) defendants DeMars, Richardson, and Kasten disciplined plaintiff for discussing Johnson's and Severson's use of force, in violation of the First Amendment;

(c) defendants Kasten and Pugh have ordered plaintiff to refrain from speaking about the use of force, in violation of the First Amendment; and

(d) defendant Richardson refuses to allow plaintiff to use an ambulatory aid, in violation of the Americans with Disabilities Act and the Eighth Amendment.

2. Plaintiff is DENIED leave to proceed on all other claims. The complaint is DISMISSED as to defendants Maguire-Petke, Sweeney, University Hospitals and John Doe Nos. 1 and 2.

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. 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 28th day of October, 2010.

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