

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

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CONRAD LEE VARGAS,

Plaintiff,

v.

OPINION AND ORDER

PETER GAVIN, MATTHEW FIDDLE,  
DREW NEILSON, JEREMY LEIRMO,  
LUKE FULLMER, LARRY DILLENBERG,  
WILLIAM SWIEKATOWSKI, JOHN and JANE DOES,

10-cv-814-wmc

Defendants.

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Plaintiff Conrad Lee Vargas alleges that defendant correctional officers at the Green Bay Correctional Institution used excessive force while removing him from his cell in violation of the Eighth Amendment. Vargas asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915 and for appointment of counsel. From the financial affidavit Vargas has provided, the court concludes that he is unable to prepay the full fee for filing this lawsuit. Vargas has made the initial partial payment of \$3.00 required of him under § 1915(b)(1).

The next step is determining whether Vargas's proposed action is (1) frivolous or malicious, (2) fails to state a claim on which relief may be granted, or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Because Vargas meets this threshold, he will be allowed to proceed and the state required to respond.

## ALLEGATIONS OF FACT

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, Vargas alleges and the court assumes for purposes of this screening order the following facts.

Plaintiff Conrad Lee Vargas is currently an inmate at the Prairie du Chien Correctional Institution, located in Prairie du Chien, Wisconsin. He was previously incarcerated at the Green Bay Correctional Institution in Green Bay, Wisconsin. Defendants Peter Gavin, Matthew Fiddle, Drew Neilson, Jeremy Leirimo, Luke Fullmer, Larry Dillenberg, William Swiekatowski and John and Jane Does are employed as correctional officers at the Green Bay Correctional Institution.

On February 7, 2008, these correctional officers entered his cell and assaulted him. Vargas was pushed to the rear of his cell, slammed to the ground, and then kneed or elbowed in the face. Vargas states, "I don't know which officer hit me but all were present; and none told officer to stop!"

Also, Vargas alleges that he was denied a video copy of the tape of the incident and pictures of his injuries. His injuries included a black and bruised eye, an abrasion on his cheek, loss of vision in his left eye and a deviated septum.

## OPINION

Excessive force claims are governed by the Eighth Amendment. They require a court to determine "whether [the] 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.

At this early screening stage, Vargas's allegations against the defendants sufficient to go forward given his statements that (1) they were present when he was assaulted, (2) one of them assaulted him and (3) the others did not stop the assault. Although Vargas's allegations pass muster under the court's lower standard for screening, he should be aware that to be successful on his claim he will have to prove that each defendant either applied force maliciously and sadistically for the very purpose of causing harm or was able to stop the application of such force and failed to do so. This may prove exceedingly difficult since Vargas's own pleading suggests his refusal to depart his cell voluntarily required the application of at least some modicum of force.

Vargas moves for appointment of counsel stating that he has tried to obtain counsel on his own but has been unable to do so. Although this is the first step, a plaintiff must take

before he is appointed counsel, *Jackson v. County of McLean*, 953 F. 2d 1070 (7th Cir. 1992),

the court has discretion to determine whether appointment of counsel is appropriate in a particular case. *Pruitt v. Mote*, 503 F. 3d 657, 654, 656 (7th Cir. 2007). The court must determine from the record whether the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. *Id.* at 655. At this very early stage of the proceedings, the court does not have enough information to determine whether appointment of counsel is warranted in this case. Vargas's motion for appointment of counsel will be denied without prejudice. He may refile his motion at a later date if he believes he is unable to prosecute this case on his own.

#### ORDER

IT IS ORDERED that:

- (1) Plaintiff Conrad Lee Vargas's request to proceed is GRANTED on his claims that defendants Peter Gavin, Matthew Fiddle, Drew Neilson, Jeremy Leirimo, Luke Fullmer, Larry Dillenberg, William Swiekatowski, and John and Jane Does violated his Eighth Amendment rights.
- (2) Plaintiff's motion for appointment of counsel is DENIED without prejudice.
- (3) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows 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 plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

- (5) 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 his institution of that institution's obligation to deduct payments until the filing fee has 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 4<sup>th</sup> day of August, 2011.

BY THE COURT:

/s/

WILLIAM M. CONLEY  
District Judge