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

EDWARD HEUER,

Plaintiff,

v.

STEVEN TETZLAFF,

Defendant.

OPINION AND ORDER

11-cv-302-slc

This is an action for monetary damages brought pursuant to 42 U.S.C. § 1983. Plaintiff Edward Heuer has been granted leave to proceed on his claim that on June 17, 2010, while Heuer was an inmate at the Fox Lake Correctional Institution (FLCI) in Fox Lake, Wisconsin, correctional officer Steven Tetzlaff violated Heuer's right to be free from excessive force when he unjustifiably pushed Heuer's wheelchair into a door frame and slammed his hand into a desk while distributing medication to Heuer. Before the court is defendant's motion for summary judgment. Dkt. 16.

On July 13, 2012, this court entered an order advising Heuer that he had failed to comply with this court's *Procedure to be Followed on Motions for Summary Judgment* in responding to Tetzlaff's proposed findings of fact. *See* Order, dkt. 9. Specifically, Heuer had failed either to state his version of the fact or to cite to any evidence that supported his version of the fact. I explained to Heuer that to properly raise an issue of fact, he needed to submit an affidavit or declaration setting out his version of the facts. *Id.* at 2. Although Heuer made an attempt to correct his filing, he failed to file the affidavit that he cited in support of several of his responses. Dkt. 31. The court gave him once last chance to cure his defective submission by submitting the affidavit and other evidence that he had cited. Dkt. 32. Heuer failed to do so, choosing instead to file various investigative and incident reports. Dkt. 33. Accordingly, pursuant to this court's

Procedures to be Followed on Summary Judgment, Heuer's responses to proposed facts which are not supported by evidence in the record have not been considered by the court.

Because Heuer has failed to adduce any evidence that Tetzlaff used any force in distributing his medication on June 17, 2010, Grant is entitled to summary judgment as a matter of law. However, even if the court were to consider Heuer's version of the facts, they would not support a jury finding that Tetzlaff used excessive force under the applicable legal standard.

For the purpose of deciding Tetzlaff's motion for summary judgment, I find from the parties' submissions that the facts set out below are material and undisputed:

FACTS

All the events alleged in this lawsuit occurred at the Fox Lake Correctional Institution (FLCI), where Heuer was an inmate.[1] Defendant Steven Tetzlaff was a sergeant employed at the institution.

On June 17, 2010, Tetzlaff was the sergeant working on Unit 3. As part of his duties, Tetzlaff was responsible for distributing prescribed medications to inmates who were scheduled to receive closely monitored drugs. This included Heuer, who used a wheelchair at that time. Heuer was required to report to the center office at 8:30 every evening to receive his medication.

To receive medication, an inmate must present his identification card. On June 17, 2010, Heuer did not have his identification card with him when he came to the center office to receive his medication. Instead, Heuer showed Tetzlaff his clothing name tag, which showed his name and inmate number. Tetzlaff refused to accept Heuer's proposed alternate form of

[1] Heuer was released from custody about a year ago and moved to Hebron, Illinois.

identification and informed Heuer that he needed his ID card in order to receive his medication. Heuer was upset about this and became very loud and eventually left the office.

Heuer eventually came back to the center office with his ID card. He continued to be very loud and demanding. Although Tetzlaff instructed Heuer to calm down, Heuer refused. Upon entering the office, Heuer extended his left hand in order to receive his medication. Heuer and Tetzlaff were both arguing back and forth. As Tetzlaff was trying to give Heuer his medication, Heuer kept moving his hand around. The medication was contained in a type of blister pack and each pill had to be extracted from the blister pack. When Tetzlaff "punched out" the medication for Heuer, Tetzlaff observed Heuer's hands shaking quite heavily and then one of the two pills flew out of Heuer's hands. Tetzlaff believes that Heuer intentionally let the one pill drop to the floor because Heuer was still agitated with Tetzlaff for requiring Heuer to show Tetzlaff his ID card.

The dropped pill landed in front of Heuer's wheelchair by his feet. Tetzlaff ordered Heuer to pick up the pill and Heuer said, "If you want the pill, you pick it up". Each time that Tetzlaff ordered Heuer to pick up the pill, Heuer told Tetzlaff to pick it up. Rather than continuing to argue with Heuer, Tetzlaff came around the desk to pick up the pill. Because Tetzlaff did not want to jeopardize his safety by bending over directly in front of an agitated inmate, he pushed Heuer's wheelchair out toward the hallway so he could safely pick up the pill.

Although Tetzlaff gave Heuer's wheelchair a good push, it barely moved out of the office area and traveled approximately two or three feet. Heuer's shoulders did not hit the door frame as Heuer alleged in his complaint. Tetzlaff's only goal in pushing Heuer's wheelchair was to make a safe environment for Tetzlaff to pick up the pill. If Tetzlaff had not moved Heuer's wheelchair, then he would have risked being kicked or otherwise harmed by Heuer.

(If the court were to assume a fact not in evidence, namely that Heuer's shoulder somehow had hit the door frame while Heuer was sitting in his wheelchair, then this fact, which is in evidence, becomes material: Tetzlaff did not intend to cause any harm to Heuer when he pushed his wheelchair.)

After Tetzlaff picked up the first pill, He saw that a second pill was on the floor. Another inmate picked up the second pill for Tetzlaff. Once Tetzlaff had retrieved both of Heuer's pills from the floor, Heuer went back into the center office to get the rest of his medications. Heuer extended his hand out to receive his medications, but he kept his hand very close to the edge of the desk. Because Tetzlaff believed that if Heuer kept his hand so close to the edge of the desk, the pills would go on the floor again, he ordered Heuer to put his hand in the middle of the desk. Heuer then smacked his own hand onto the desk, hard. Tetzlaff responded by hitting his own hand on the desk and stating, "I can do that too." Tetzlaff did not slam Heuer's hand while it was on top of the desk as Heuer alleges.

Heuer continued to complain and be disruptive. Heuer also demanded to receive the rest of his medications. Tetzlaff told Heuer that he had already given him the only medications in the book, so Tetzlaff asked Heuer what he was referring to. Heuer stated, "You should know." Tetzlaff told Heuer that he did not know. Heuer stated, "Spray." Tetzlaff then got Heuer's nasal spray out and gave it to him. Heuer used his nasal spray and left the center office still grumbling. Following the incident between Tetzlaff and Heuer, Heuer thought that he would be sent to segregation for the argument.

On June 18, 2010, Heuer was seen by medical personnel. A physical examination showed no abnormalities with Heuer's hand, and Heuer reported that his hand felt okay. Heuer's main complaint during the examination was that his left shoulder had hit the door frame. Upon

examination, his left shoulder had no abnormalities, bruising, open skin or redness. His left arm had a full range of motion as compared to his right arm.

Although Heuer claimed his left shoulder was fine before his interaction with Tetzlaff on June 17, 2010, Heuer had a history of pre-existing injuries to his left shoulder. In December 2008, Heuer reported shoulder pain and was diagnosed with adhesive capsulitis, a condition in which the shoulders are painful and lose motion because of inflammation and stiffness within the joint capsule. In January 2009, the institution physician informed Heuer that an x-ray of his right shoulder indicated mild shoulder degenerative joint disease-arthritis (DJD) (a noninfectious progressive disorder of the weight bearing joints) and osteoarthritis (OA) (a degenerative arthritis or joint disease caused by cartilage loss in a joint). Also in 2009, Heuer underwent physical therapy for his shoulders. The provider notes confirm that Heuer was suffering from significant losses in range of motion and strength for both shoulders and that Heuer was reporting significant pain in both shoulders.

On July 21, 2010, Heuer was seen by medical personnel for complaints of right shoulder pain. Heuer described his right shoulder pain as aching and stabbing and complained of left shoulder pain due to an officer allegedly pushing him into a door frame. He requested another steroid injection in his right arm because it had helped in the past.

On August 20, 2010, Heuer reported that his right shoulder pain had worsened and that his left shoulder had been bothering him since an altercation with security staff. The FLCI physician noted that "once again both shoulders are very stiff and hard to raise with diffuse joint pain both anterior and especially posterior." An examination did not show significant change except that Heuer had significant relapse in his guarding of his left shoulder worse than his right in all places of motion with much stiffness and tenderness, anterior and especially posterior

capsules. There were no rotator deficits or impingements. Heuer requested and received steroid injections in both shoulders.

On January 31, 2011, Heuer reported pain in both shoulders with his right shoulder worse than his left. On April 1, 2011, an x-ray of Heuer's left shoulder was taken and revealed mild DJD/OA but no evidence of acute fractures or dislocations, and "unremarkable" soft tissues.

Based on a review of Heuer's medical records and his own examination of Heuer in 2009 and 2010, Charles Larson, a FLCI physician, has opined that, in his professional judgment, Heuer did not suffer any "new" injuries to his left shoulder on June 17, 2010 and his examinations remained consistent with the PMR and DJD/OA diagnoses. According to Larson, these conditions are chronic degenerative disorders that can be expected to reduce joint function and result in chronic pain, as they have for Heuer. The chronic pain and reduced motion can be expected to lead to adhesive capsulitis, which further reduces motion and function and increases the chronic pain. This leads to a cycle of progressive pain and stiffness with progressive loss of motion than can be difficult to treat and often impossible to prevent over time.

OPINION

I. 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(a). "'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 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th 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 (7th 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). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

II. Excessive Force

In the prison context, excessive force claims arise under the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1 (1992); *Whitley v. Albers*, 475 U.S. 312 (1986). 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 must sometimes 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. In this context, "'[m]aliciously' means intentionally injuring another without just cause or reason . . .[;] '[s]adistically' means engaging in 'extreme cruelty or delighting in cruelty.'" *Fillmore v. Page*, 358 F.3d 496, 509 (7th Cir. 2004) (approving district court's jury instruction to this effect).

To determine whether force was used appropriately, a court considers factual allegations revealing 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 (7th Cir. 2001). The Supreme Court has explained that "the Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Hudson*, 503 U.S. at 9-10. Therefore, not every "malevolent touch by a prison guard" gives rise to a federal cause of action, even if the use of force in question "may later seem unnecessary in the peace of a judge's chambers." *Outlaw*, 259 F.3d at 838 (quoting *id.*) In addition, although a plaintiff need not suffer a significant injury in order to prevail on an Eighth Amendment excessive-force claim, the extent of his injury "may . . . provide some indication of the amount of force applied." *Wilkins v. Gaddy*, ___ U.S. ___, 130 S. Ct. 1175, 1178 (2010); *see also Hudson*, 503 U.S. at 7 (absence of serious injury is relevant to Eighth Amendment inquiry, "but does not end it").

Here, the undisputed facts show that Tetzlaff pushed Heuer's wheelchair out of the way so that he could safely retrieve Heuer's dropped pill, pushing back Heuer's wheelchair about two or three feet. Although Heuer alleges in his complaint that Tetzlaff shoved his wheelchair so that Heuer's shoulders hit the door frame, Heuer did not adduce any admissible evidence to this effect. Similarly, Heuer failed to adduce any evidence that Tetzlaff slammed Heuer's hand onto the desk. According to Tetzlaff's uncontroverted version of the events, which the court must accept as true, Heuer hit his own hand on the desk. From these facts, no reasonable jury could conclude that Tetzlaff used any level of force against Heuer, entitling Tetzlaff to summary judgment.

For argument's sake, I note that even if Heuer had adduced evidence in support of his claims, it is unlikely that his alleged version of the events would constitute excessive force under

the law of this circuit. The Seventh Circuit has held that a simple act of shoving qualifies as the kind of *de minimis* use of force that does not constitute cruel and unusual punishment. *See Jones v. Walker*, 358 Fed. Appx. 708, 713 (7th Cir. 2009) (unpublished); *DeWalt v. Carter*, 224 F.3d 607, 610–11 (7th Cir. 2000). The court also has found that hitting a prisoner in the head with a bucket, causing him daily headaches, is a minor use of force insufficient to establish constitutional violation. *Lunsford v. Bennett*, 17 F.3d 1574, 1578, 1582 (7th Cir. 1994). Similarly, closing a cell trap door on a prisoner's hand in an attempt to force the prisoner to remove his hand from the trap is an acceptable use of force. *Outlaw*, 259 F.3d at 839 (officer who slammed trap door on plaintiff's hand after plaintiff placed it in trap to hand officer some garbage applied relatively minor amount of force to achieve legitimate security objective and caused only superficial injuries to plaintiff's hand). *Cf. Thomas v. Stalter*, 20 F.3d 298, 301-02 (7th Cir. 1994) (punching a prisoner with a closed fist while prisoner is held down by other officers exceeds *de minimis*).

The evidence must show more than a dispute over whether the use of force was reasonable or whether alternatives existed; it must lead to an inference that the officer applied the force in a malicious and sadistic manner. *See Whitley*, 475 U.S. at 323-24. No such inference can be drawn from Heuer's version of the events. At most, Heuer's account shows that Tetzlaff was frustrated and angry with Heuer because Tetzlaff believed that Heuer was dropping his pills on purpose. *See Ellis v. Bennett*, no. C 09-00247, 2011 WL 1303654, *2 (N.D. Cal. Mar. 31, 2011) (finding same where defendant allegedly pulled plaintiff's wheelchair out from under him in an effort to move him from his cell and noting that evidence showed, at most, a lack of due care).

Although Heuer alleges two separate acts of excessive force, he does not allege any malice on Tetzlaff's part. It is undisputed that Tetzlaff had a legitimate security interest in moving Heuer's wheelchair so that he could retrieve the pills safely. *See Outlaw*, 259 F.3d at 839 (keeping cell door traps closed is legitimate security interest that may be achieved through use of force). Simply slamming Heuer's hand onto the desk–if there were evidence to support this fact–also would not rise to the level of excessive force, especially given that at that point, Tetzlaff sought to prevent Heuer from dropping more pills onto the floor.

Also relevant is the fact that Heuer's medical records show that he did not suffer any injury as a result of either incident. Heuer's physician at FLCI avers that Heuer's shoulder pain arose from several preexisting conditions and had not been not aggravated by any alleged contact with a door frame. In sum, even if there were evidence from which a reasonable jury could find that Tetzlaff had pushed Heuer into a door frame and had done so deliberately or unnecessarily, the undisputed evidence would lead the jury to conclude that Tetzlaff had used a relatively minor amount of force to achieve a legitimate security objective without causing any actual injury to Heuer. *See Outlaw*, 259 F.3d at 839 (finding same). As a result, Tetzlaff is entitled to summary judgment in his favor.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Steven Tetzlaff, dkt. 16, is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 27th day of August, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge