

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

DERRICK HOWARD,

Plaintiff,

v.

OFFICER HOOVPER, JANEL NICKEL,
HEAD WARDEN OF C.C.I.,
LT. SABASH and SGT. SCHNEITER,

Defendants.

ORDER

11-cv-629-bbc

In this proposed civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Derrick Howard, a prisoner at the Wisconsin Resource Center, contends that defendant Officer Hoover used excessive force against him and defendants Janel Nickel, Lt. Sabash, Sgt. Schneider and the warden of the Columbia Correctional Institution violated his constitutional rights by allowing staff to use excessive force against him. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a

defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. 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).

After reviewing the complaint, I conclude that plaintiff may proceed on his excessive force claim against defendant Officer Hoover. However, he has not stated a claim against defendants Janel Nickel, Lt. Sabish, Sgt. Scheiter or the warden of Columbia Correctional Institution for violation of his constitutional rights and may not proceed against these defendants.

Also before the court is plaintiff's motion for appointment of counsel. Dkt. #4. Because I am not persuaded that appointment of counsel is necessary, I will deny the motion.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

At all times relevant to his complaint, plaintiff Derrick Howard was incarcerated at the Columbia Correctional Institution located in Portage, Wisconsin. On June 15, 2011, defendant Officer Hoover was escorting plaintiff from the showers, when another inmate, Mr. Conery, bumped his cell door in an attempt to scare plaintiff. Defendant Hoover took a few steps away from Conery's cell and threw plaintiff against the wall, slamming his face and the left side of his body into the wall. Then Hoover forced plaintiff to the floor,

slamming his head against the wall and floor and causing plaintiff injuries. Plaintiff told defendant Janel Nickel, the security director, defendant Lt. Sabish and defendant Sgt. Schneider about the incident but they did nothing.

DISCUSSION

A. Excessive Force

Plaintiff contends that defendant Hoover used excessive force against him in violation of plaintiff's rights under the Eighth Amendment. To state a claim of excessive force against a prison official, a plaintiff must allege that the official applied force "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The factors relevant to this determination include such matters as why force was needed, how much force was used, the extent of the injury inflicted, whether defendant perceived a threat to the safety of staff and prisoners and whether efforts were made to temper the severity of the force. *Whitley*, 475 U.S. at 321.

Plaintiff alleges that even though he was restrained and did nothing to threaten the safety of defendant Hoover or any other person, Hoover slammed plaintiff's face against the wall and floor, causing plaintiff injuries. If plaintiff's allegations are true, he may be able to prove that Hoover applied force for the sole purpose of harming him. Accordingly, I will

allow plaintiff to proceed on his excessive force claim against defendant Hoover.

Plaintiff may not proceed on his claims against the other defendants. He contends that defendant Nickel, Lt. Sabish, Sgt. Schneider and the warden of the Columbia Correctional Institution violated his constitutional rights by failing to supervise prison staff properly and supporting a policy that allows staff to abuse inmates. However, there are no allegations in his complaint to support such a claim. Although plaintiff includes conclusory statements in his complaint such as that defendants “fail to take reasonable measures to stop officers from hurting the plaintiff,” such conclusory statements in a complaint are not sufficient to allow a case to go forward. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-49 (2009).

Additionally, it is well established that liability under 42 U.S.C. § 1983 must be based on a defendant’s personal involvement in the constitutional violation, Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995), and plaintiff has alleged no facts suggesting that Nickel, Sabish, Schneider or the warden were involved personally in the constitutional violation alleged in this case. It is not sufficient to allege that these defendants are supervisors, because an individual cannot be held liable for a constitutional violation on the basis of his supervisory status. T.E. v. Grindle, 599 F.3d 583, 590 (7th Cir. 2010) (“Because there is no theory of respondeat superior for constitutional torts, a plaintiff ‘must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution’”) (quoting Iqbal, 129 U.S. at 1948)). Because plaintiff has alleged no facts supporting his

claim that these defendants maintain a prison policy in which prison officials are permitted to use excessive physical force against inmates, these defendants will be dismissed from the case.

B. Motion for Appointment of Counsel

Plaintiff has filed a motion for appointment of counsel, stating that he suffers from mental disabilities and will not be very good at presenting his case to a jury. He says that he is currently receiving help from another inmate and that he cannot proceed with the case on his own. He has shown that he made reasonable efforts to find a lawyer by submitting the names and addresses of three lawyers whom he asked to represent him on the issues in this case and who turned him down.

Appointment of counsel is appropriate in those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 645-55 (7th Cir. 2007). Although plaintiff may lack legal knowledge, that is not a sufficient reason to appoint counsel, because this handicap is almost universal among pro se litigants. To help him and others in similar situation, this court instructs pro se litigants at a preliminary pretrial conference about how to use discovery techniques available to all litigants so that he can gather the evidence he needs to prove his claim. In addition, plaintiff will be provided with a copy of this court's procedures for filing or opposing dispositive motions and for calling

witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work.

As for plaintiff's mental disabilities, it is too early to tell whether they will overwhelm his ability to litigate this case. Plaintiff's case is not complex and he may continue to receive help from other inmates. As this case progresses, it may become apparent that appointment of counsel is warranted, but for now I will deny his motion. Plaintiff is free to renew his motion at a later date.

ORDER

IT IS ORDERED that

1. Plaintiff Derrick Howard is GRANTED leave to proceed on his claim that defendant Office Hoover used excessive force against him in violation of plaintiff's Eighth Amendment rights.

2. Plaintiff is DENIED leave to proceed on his claims that defendants Janel Nickel, Lt. Sabish, Sgt. Schneider and the warden of the Columbia Correctional Institution violated his constitutional rights.

3. Plaintiff's motion for appointment of counsel, dkt. #4, is DENIED.

4. Under 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 state defendant. 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 on behalf of the state defendant.

5. For the remainder of the lawsuit, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

6. 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.

7. 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 officials at the Wisconsin Resource Center of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 7th day of October, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge