IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE SIMPSON,

OPINION and ORDER

Plaintiff,

11-cv-851-bbc

v.

TIMOTHY HAINES,

Defendant.

- -

In this case, plaintiff Willie Simpson pursued Eighth Amendment claims challenging his conditions of confinement and defendant Warden Timothy Haines's failure to protect him, alleging that Haines was aware that correctional officers were pumping "toxic chemicals" into his cell and did nothing to stop it. In an April 29, 2013 order, I dismissed plaintiff's motion to replace his Eighth Amendment claims with what he termed Fourteenth Amendment conditions of confinement claims, granted defendant's motion for summary judgment while denying plaintiff's summary judgment motion and directed the clerk of court to close the case. Dkt. #113.

Now plaintiff has filed two essentially identical motions to alter or amend judgment under Fed. R. Civ. P. 59. (Plaintiff states that he filed the second motion because the caption of the first was misdated. This error does not preclude me from considering the arguments plaintiff raises in the first motion, so I will deny the second as unnecessary.) Also, plaintiff

has filed a notice of appeal along with a request to proceed in forma pauperis on appeal.

In his Rule 59 motion, plaintiff argues that the court erroneously applied an "excessive force" standard rather than a "failure to protect" standard. The key paragraphs of the April 29, 2013 order read as follows:

> Because plaintiff has not provided facts about the conditions of confinement or particular acts about the use of chemical agents, defendant's version is undisputed. The undisputed facts show that prison officials used pepper spray against plaintiff four times over the course of more than a year (July 30, 2011, August 14, 2011, November 20, 2012 and September 13, 2012), each time as part of a cell extraction after plaintiff refused to comply with staff's directions for him to leave the cell. The use of chemical agents is not a per se violation of the Eighth Amendment; chemicals may be used in limited quantities when reasonably necessary to subdue or maintain control over an inmate. Soto v. Dickey, 744 F.2d 1260, 1270-71 (7th Cir.1984). The use of such an agent violates the Eighth Amendment only if it is used "in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain." Id. Plaintiff does not provide any evidence indicating that this was so or any evidence indicating that Haines personally approved those usages or was given any reason to think that prison officials were abusing the use of pepper spray.
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> Plaintiff argues that he was in danger because he was overseen by the same prison staff members whom he had been accused of battering in an earlier incident, but he does not describe any threats by prison officials tied to the criminal charges. In short, the facts in the summary judgment record are vastly different from the allegations in plaintiff's complaint that he was constantly being illicitly sprayed with "toxic chemicals" in retaliation for an earlier scuffle with prison officials. Because the undisputed facts do not indicate that defendant Haines violated plaintiff's constitutional rights under either the Eighth or Fourteenth amendments, I will deny plaintiff's motion for summary judgment, grant defendant's motion and direct the clerk of court to enter judgment for defendant.

Dkt. #113, at 3-4. Plaintiff seizes on the citation to Soto, a case in which the court stated, "The record in this case fails to disclose that prison officials unjustifiably used excessive force against plaintiffs, or other inmates or that they failed to act in good faith and with a

reasonable belief of the lawfulness of their actions under the circumstances," as an indication that this court applied an incorrect "excessive force" analysis rather than the appropriate "failure to protect" and "conditions of confinement" claims.

Plaintiff's argument fails because the language I used in analyzing his claims was tailored to the summary judgment record, in which plaintiff completely failed to dispute defendant's version of the facts or explain why a particular use of pepper spray was excessive. According to the evidence adduced by defendant, there had only been four uses of pepper spray against plaintiff, each time as part of a cell extraction after plaintiff refused to comply with staff's directions for him to leave the cell, none of these had been authorized by defendant and defendant had not otherwise been given any reason to think that prison staff were abusing the use of pepper spray. That leaves no evidence that defendant Haines (or the prison staff who actually used the pepper spray) violated plaintiff's Eighth Amendment rights, whether plaintiff's claim is viewed through the lens of excessive force, failure to protect (requiring in part that an inmate be incarcerated under conditions posing a "substantial risk of serious harm," Farmer v. Brennan, 511 U.S. 825, 834 (1991)) or more general conditions of confinement, (requiring in part that 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." Townsend v. Fuchs, 522 F.3d 765, 773 (7th Cir. 2008)). In short, the April 29, 2013 order did not delve into nuances of Eighth Amendment doctrine because plaintiff's claims failed at the very outset, because he had refused to submit proposed findings of fact supporting his complaint's version of the events at issue in this case. Accordingly, I will deny his Rule 59 motion.

Finally, plaintiff's request for leave to proceed in forma pauperis on appeal is governed by the 1996 Prison Litigation Reform Act. This means that this court must determine first whether plaintiff's request must be denied either because he has three strikes against him under 28 U.S.C. § 1915(g) or because the appeal is not taken in good faith. Plaintiff does not have three strikes against him and I do not intend to certify that his appeal is not taken in good faith.

From plaintiff's trust fund account statement, I conclude that he qualifies for indigent status. Further, I assess plaintiff an initial partial payment of the $455 fee for filing his appeal in the amount of $0.58.

If plaintiff does not have the money to make the initial partial appeal payment in his regular account, he will have to arrange with prison authorities to pay some or all of the assessment from his release account. The only amount plaintiff must pay at this time is the $0.58 initial partial appeal payment. Before prison officials take any portion of that amount from plaintiff's release account, they may first take from plaintiff's regular account whatever amount up to the full amount plaintiff owes. Plaintiff should show a copy of this order to prison officials to make sure they are aware they should send plaintiff's initial partial appeal payment to this court.

ORDER

IT IS ORDERED that

(1) Plaintiff Willie Simpson's first motion to alter or amend judgment, dkt. #115, is DENIED.

(2) Plaintiff's second motion to alter or amend judgment, dkt. #116, is DENIED as unnecessary.

(3) Plaintiff's request for leave to proceed in forma pauperis on appeal, dkt. #124, is GRANTED. Plaintiff may have until June 21, 2013, in which to submit a check or money order made payable to the clerk of court in the amount of $0.58. If, by June 21, 2013, plaintiff fails to pay the initial partial payment or explain his failure to do so, then I will advise the court of appeals of his noncompliance in paying the assessment so that it may take whatever steps it deems appropriate with respect to this appeal. Further, the clerk of court is requested to insure that the court's financial records reflect plaintiff's obligation to pay the $0.58 initial partial payment and the remainder of the $455 fee in monthly installments.

Entered this 31st day of May, 2013.

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