IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY LEE LEWIS,

OPINION AND ORDER

Plaintiff,

14-cv-40-bbc

v.

LIEUTENANT ESSER and
3 UNKOWN STAFF MEMBERS,

Defendants.

- -

Pro se prisoner Jerry Lee Lewis has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that defendant Esser and three other officers at the Wisconsin Secure Program Facility violated the Eighth Amendment by forcing him to walk in leg restraints that were too small and then using excessive force when he failed to comply with orders to walk with the restraints. Dkt. #2. In addition, he has filed a motion in which he asks the court to "take into custody" any security videos that may show the events relevant to his claims. Dkt. #2. Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1).

Having reviewed the complaint as I am required to do under 28 U.S.C. § 1915A, I conclude that plaintiff has stated a claim upon which relief may be granted under the Eighth Amendment. However, I am denying plaintiff's motion to take custody of evidence because he has shown neither that the court has the authority to grant his request or that it is

necessary to do so under the circumstances of this case.

OPINION

A. Screening under § 1915A

I understand plaintiff to be contending that defendants violated his Eighth Amendment rights in two ways. First, on multiple occasions on October 22, 2013, defendants forced plaintiff to walk in leg shackles that were too small for his body, causing "serious distress and pain" and several "gashes" in his skin. Cpt. ¶¶ 35-36, dkt. #1. Second, when plaintiff objected to walking in the restraints, defendants "forced plaintiff to his feet by bending both of plaintiff[']s wrist[s] toward his forearm, causing great pain." Id. at ¶ 12. See also id. at ¶¶ 13 and16. Plaintiff also includes an allegation that for one hour he was placed in a cell that was "covered in human feces," id. at ¶ 17, but I do not understand him to be raising a separate claim about cell conditions because he did not include it in the summary of his claims at the end of his complaint and he does not identify any harm that he suffered from the short time that he was placed in the cell. Cf. Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988) (depriving prisoner of toilet paper, soap, toothpaste and toothbrush while keeping him in filthy, roach-infested cell for a period of several days was not constitutional violation).

In a previous case in which plaintiff alleged that correctional officers had used restraints on him that were too small, I noted that there was some uncertainty in the law regarding the proper standard to apply. Lewis v. Haines, 13-cv-457-bbc (W.D. Wis. Aug.

20, 2013). One possibility was the standard for excessive force cases: "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). Another possibility was the standard for conditions of confinement cases: whether defendants were "deliberately indifferent" to plaintiff's health or safety, or, in other words, whether defendants consciously disregarded a substantial risk of serious harm. Guzman v. Sheahan, 495 F.3d 852, 857 (7th Cir. 2007). Courts have applied both standards to claims involving the allegedly improper use of restraints on prisoners. Compare Hope v. Pelzer, 536 U.S. 730, 737-38 (2002) (applying deliberate indifference standard to claim that defendants handcuffed prisoner to hitching post for seven hours), and Gruenberg v. Gempeler, 697 F.3d 573, 579-80 (7th Cir. 2012) (applying deliberate indifference standard to claim that defendants restrained prisoner for five days), and Key v. McKinney, 176 F.3d 1083, 1086 (8th Cir. 1999) (applying deliberate indifference standard to claim that defendants placed prisoner in handcuffs and shackles for 24 hours), with O'Malley v. Litscher, 465 F.3d 799, 805 (7th Cir. 2006) (applying excessive force standard to claim that defendants placed plaintiff in five-point restraints for several hours, applied them too tightly and refused to allow plaintiff to use bathroom), and Williams v. Burton, 943 F.2d 1572, 1576 (11th Cir. 1991) (applying excessive force standard to claim that defendants placed prisoner in four-point restraints for more than 28 hours). See also Santiago v. Walls, 599 F.3d 749, 757 (7th Cir. 2010) (referring to both excessive force standard and deliberate indifference standard in discussing use of handcuffs in prison). In other cases, the courts have assumed

that restraints may violate the Constitution under some circumstances without specifying a standard of review. Murphy v. Walker, 51 F.3d 714, 718 (7th Cir. 1995) ("If Murphy was indeed shackled to the floor of his cell, and we assume his factual allegations are true for the purposes of this appeal, the district court erred in dismissing this claim.") (internal citation omitted); Wells v. Franzen, 777 F.2d 1258, 1264-65 (7th Cir. 1985) ("[P]laintiff's allegations concerning the conditions of his restraint are sufficient to warrant further examination.").

As I did in case no. 13-cv-457-bbc, I conclude that the deliberate indifference standard should apply to the use of restraints in this case. The Supreme Court has explained that the excessive force standard is appropriate when "corrections officials must make their decisions 'in haste, under pressure, and . . . without the luxury of a second chance."' Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting Whitley, 475 U.S. at 320). That is not the situation in this case because none of the uses of restraints alleged in plaintiff's complaint required defendants to make a quick decision. Rather, plaintiff alleges that defendants had ample opportunity to decide to use a more accommodating restraint.

I conclude that plaintiff has stated a claim upon which relief may be granted against defendants under a deliberate indifference standard. Plaintiff alleges that defendant Esser and the three unknown officers used the tight restraints on plaintiff even though he protested that he had a medical restriction requiring larger restraints and that he could not walk in the smaller restraints. Later the same day, defendants used the same restraints on plaintiff multiple times, even after he complained that the restraints were "cutting [him] up."

Cpt. ¶ 15, dkt. #1.

At this stage, those allegations are sufficient to show that defendants knew that plaintiff was being subjected to a substantial risk of serious harm and they consciously refused to take reasonable measures to prevent the harm from occurring. Although plaintiff does not allege that he has experienced long-term medical problems, the pain he says he experienced at the time is sufficient to state a claim under the Eighth Amendment. Smith v. Knox County Jail, 666 F.3d 1037, 1039-40 (7th Cir. 2012); Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 830 (7th Cir. 2009). At summary judgment or trial, plaintiff will have to come forward with specific evidence of harm and defendants' knowledge of it.

With respect to the force defendants used to make plaintiff walk in the restraints, I conclude that the excessive force standard applies because defendants were making a determination in the moment about how to make plaintiff comply with an order. Guitron v. Paul, 675 F.3d 1044, 1045-46 (7th Cir. 2012) (applying excessive force standard to use of force after failure to comply with order); Lewis v. Downey, 581 F.3d 467, 476-77 (7th Cir. 2009) (same). The factors relevant to deciding whether an officer used excessive force 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

Whitley, 475 U.S. 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. Similarly, the Court of Appeals for the Seventh Circuit has cautioned district courts not to dismiss claims simply because the defendant used a small amount of force; rather, the court must consider all of the relevant factors. Washington v. Hively, 695 F.3d 641, 642-43 (7th Cir. 2012).

In this case, plaintiff alleges that on multiple occasions defendants twisted his writs and subjected him to great pain simply because he did not comply with their orders to stand and walk. Although the general rule is that prison officials are entitled to use some force when a prisoner refuses to comply with a "proper" order, Soto v. Dickey, 744 F.2d 1260, 1267 (7th Cir. 1984), plaintiff's allegations suggest that the order may not have been proper because defendants knew that he was unable to walk in the restraints without harming himself. Richer v. La Crosse County, No. 01-C-649-C, 2002 WL 32341946, *5 (W.D. Wis. Dec. 5, 2002) ("If the order itself was made in bad faith or if the order involved patently unreasonable conduct, such as harming the inmate himself or another person, then it certainly could be argued that any amount of force used to insure obedience to the order would be excessive."). See also Felix v. McCarthy, 939 F.2d 699 (9th Cir.1991) (holding that officer was not entitled to qualified immunity when he pushed and handcuffed inmate

for refusing to comply with an order to clean up officer's spit). Even if some force was reasonable, plaintiff's allegations suggest that defendants could have used less force than they did. Accordingly, I will allow him to proceed on this claim. At summary judgment or trial, it will be plaintiff's burden to come forward with specific evidence from which a reasonable jury could find that defendants violated the standard articulated in Whitley.

Although plaintiff does not know the names of three of the officers involved, that is not a reason for dismissing the claim. "[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir.1996); see also Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir.1981) (if prisoner does not know name of defendant, court may allow him to proceed against administrator for purpose of determining defendants' identity). Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendants.

B. Security Videos

Accompanying plaintiff's complaint is a motion for the court to "take . . . custody" of evidence relevant to plaintiff's claims. In particular, plaintiff asks the court to obtain any

relevant "security video recordings" before they "suddenly become erased, missed or [defendants use] other excuses . . . for not producing" the recordings. Dkt. #2. I am denying the motion.

First, plaintiff does not cite any authority to support his request and he identifies no reason to believe that defendants or anyone else will destroy any relevant video recordings in response to this lawsuit. Second, plaintiff's motion is unnecessary. Once the court holds a preliminary pretrial conference (shortly after defendants file an answer to the complaint), plaintiff will be free to serve defendants with a discovery request to view any relevant video recordings under Fed. R. Civ. P. 34. In the meantime, if video recordings exist of the incidents relevant to this case, plaintiff's complaint will give notice to defendants of their duty to preserve the recordings. The law already prohibits parties from destroying evidence for the purpose of hiding adverse information. If prison officials destroy relevant evidence in response to plaintiff's lawsuit, plaintiff could seek sanctions and ask the court to draw the inference that the recordings contained evidence supporting plaintiff's claim. Bracey v. Grondin, 712 F.3d 1012, 1019-20 (7th Cir. 2013); Norman-Nunnery v. Madison Area Technical College, 625 F.3d 422, 428-29 (7th Cir. 2010). To the extent that officials already have erased or destroyed relevant recordings, the court cannot take custody of something that no longer exists.

ORDER

IT IS ORDERED that

1. Plaintiff Jerry Lee Lewis is GRANTED leave to proceed on his claims that defendant Esser and the three unknown defendants violated his Eighth Amendment rights by (1) forcing him to walk in leg restraints that were too small; and (2) using excessive force on him when he failed to comply with orders to stand and walk while wearing the restraints.

2. Plaintiff's motion take custody of any security videos that may show the events relevant to his claims, dkt. #2, is DENIED.

3. For the time being, 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 his 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 defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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.

6. 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). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund accounts until the filing fee has been paid in full.

Entered this 28th day of February, 2014.

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