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

CARL T. HARRIS,

Plaintiff,

v.

ERIC BILLINGTON et al.,

Defendants.

OPINION & ORDER

12-cv-437-wmc

Plaintiff Carl T. Harris has been granted leave to proceed on claims under 42 U.S.C. § 1983 that various employees at Waupun Correctional Institution ("WCI") ignored his suicidal thoughts and behavior in violation of the Eighth Amendment. In the same order, Harris was denied leave to proceed against certain defendants, including Captain Wayne Bauer and Security Director Anthony Meli, on claims that they were deliberately indifferent to his need for mental health care. Harris has since moved to amend his complaint to cure the defects with respect to those two defendants, stating that he has learned through discovery those defendants had a more active role in denying him medical care than his original complaint suggested.[1] (Dkt. #37.) Harris has also filed various other motions, including a motion to compel (dkt. #41) and two motions for sanctions (dkt. ##31, 43). The court will address each of these motions in turn.

[1] Harris also filed a motion for reconsideration of this court's decision to deny leave to proceed against Bauer in the original screening order (dkt. #28) and a motion to reinstate Bauer and Meli as defendants (dkt. #36). Those motions will be denied as moot.

OPINION

I. Motion to Amend

Federal Rule of Civil Procedure 15, which governs amendments to pleadings, may generally be used to add new parties to a case. 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1474, at 629. The court is directed to "freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2). Thus, amendments to pleadings are generally allowed absent "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). An amendment is considered "futile" if the complaint, as amended, still fails to state a claim on which relief could be granted. *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997) (citations omitted).

A. Wayne Bauer

With respect to Bauer, Harris alleges in his amended complaint that on April 12, 2012, he was suicidal and pressed the emergency call button. After defendant Billington refused to assist him, Harris began to bang his head and face violently against his cell door and wall. In doing so, he broke his nose, which bled all over the door, floor and window. He again pressed the emergency call button to inform defendant Russell that he was bleeding, but no one responded.

About five minutes later, he began to call out to the officers to inform them he was bleeding, but they merely laughed, disregarding his injuries. At about 9:30 p.m., Harris became more agitated and began to violently bang his head and face against the window,

covering it in blood. He passed out and came to about 20 minutes later. When he realized no one had come to check on him, he began to feel abandoned. He tied a sheet around his neck, wrapped himself in a blanket and began to think of ways to kill himself.

Between 10:20 and 10:45 p.m. on April 12, Sergeant Schilling, who is not a defendant in this lawsuit, saw the bloodied windows and began to talk to Harris, who did not respond. Some time later, proposed defendant Captain Wayne Bauer came and attempted to speak to Harris, but again, Harris did not respond. Bauer decided to enter Harris's cell, and around 11:30 p.m., he accordingly returned with a cell entry team. Bauer introduced two quick bursts of OC fogger into Harris' cell, until he complied with directives to put his hands into the trap to be restrained.

Harris was given a brief shower, and then staff conducted a strip search. During the search, Schilling asked Harris where the blood came from, and Harris informed Schilling that he had banged his face on the door. Schilling then inquired whether Harris was going on observation status ("obs").[2] Bauer responded, "He's going into control. There's no need for observation. He hasn't cut on himself or anything like that."

Harris was then taken to see the on-call nurse, defendant Amy Radcliffe, who evaluated him and documented his injuries. Radcliffe asked Harris what happened, and Harris informed her that he was suicidal.

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[2] Observation status is "an involuntary or a voluntary nonpunitive status used for the temporary confinement of an inmate to ensure the safety of the inmate or the safety of others. An inmate may be placed in observation for mental health purposes for one of the following reasons: (a) the inmate is mentally ill and dangerous to himself or herself or others; (b) the inmate is dangerous to himself or herself." Wis. Adm. Code § DOC 311.04(1). An inmate is dangerous "if there is a substantial probability that the inmate will cause physical harm to himself or herself or others as manifested by any of the following: . . . (b) the reasonable belief of others that violent behavior and serious physical harm is likely to occur because of a recent overt act, attempt or threat to do such physical harm[; or] (c) Serious self-destructive behavior or the threat of such behavior." *Id.* at § DOC 311.04(3).

During the evaluation, Bauer instructed Schilling to "[p]ut [Harris] on control status.[3] I don't see any evidence of suicidal behavior." Radcliffe asked, "Are you sure?" and Bauer responded, "Yeah, he looks fine to me." On Bauer's instructions, Harris was then placed on control status, rather than obs. Due to that placement, Harris did not have a chance to see the crisis worker or on-call psychologist.

To state a claim for deliberate indifference to medical needs, Harris must allege: (1) that he had an objectively serious medical need; and (2) that the defendant was deliberately indifferent to that need. *Norfleet v. Webster*, 439 F.3d 392, 395 (7th Cir. 2006). As to the first factor, suicidal ideation is an objectively serious medical need; "prison officials must take reasonable preventative steps when they are aware that there is a substantial risk that an inmate may attempt to take his own life." *Estate of Novack ex rel. Turbin v. Cnty. of Wood*, 226 F.3d 525, 529 (7th Cir. 2000). Still, the question remains whether Harris has alleged sufficient facts to support an inference of deliberate indifference on Bauer's part.

Deliberate indifference requires that a defendant: (1) actually knows of a substantial risk of harm to the inmate; and (2) acts or fails to act in disregard of that risk. *Norfleet*, 439 F.3d at 396. According to the proposed amended complaint, Bauer was allegedly present when Harris informed Schilling that he had engaged in self-harm by banging his face against the door. Bauer was also allegedly present during Radcliffe's evaluation of Harris' injuries, including when Harris claimed to be suicidal. Finally, Bauer was at Harris' cell and presumably would have seen: (1) that Harris had a sheet tied around his neck; and (2) that the cell walls, floor and windows were bloodied. Assuming these facts are proved, they

[3] Harris alleges that control status is a nonpunitive status in which a prisoner is placed if he exhibits disruptive or destructive behavior.

would at least arguably allow for a reasonable inference that Bauer was aware Harris posed a substantial risk to himself. Allegedly, Bauer (not Radcliffe) also made the decision to place Harris on control status, rather than on obs, concluding that Harris looked "fine" and did not need to be on obs because he had not "cut on himself." If these facts are true, a reasonable jury might find that Bauer, by failing to place Harris on obs or otherwise provide for mental health care, acted in disregard of the risk that Harris would harm himself. He has, therefore, stated a claim for deliberate indifference against Bauer.

B. Anthony Meli

Harris also seeks leave to add Eighth Amendment claims against Meli. Even in his amended complaint, however, Harris has not pled a plausible deliberate indifference claim against him. Essentially, Harris alleges that he wrote to Meli after the April 12 incident to inform him of what had occurred, but that Meli lied in an attempt to cover up defendant Billington's misconduct. Even if true, these actions do not suggest that Meli *himself* was deliberately indifferent to Harris' medical needs. As noted in the original screening order, a claim under 42 U.S.C. § 1983 requires that the defendant be "personally responsible for the deprivation of the constitutional right." *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001) (quoting *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995)).

Under the amended complaint, Harris still alleges no facts suggesting that Meli was personally involved in the Eighth Amendment violation of which he complains. At best, the amended complaint suggests that Meli learned of his subordinates' allegedly unconstitutional behavior after the fact and conducted a flawed investigation so that those violations would not come to light. This does not support an inference that Meli was

personally responsible for the *deliberately indifferent conduct itself*. *See Chavez,* 251 F.3d at 651. Thus, allowing Harris's proposed Eighth Amendment claim against Meli would be futile.

C. Other Considerations

Having concluded that Harris's amended complaint pleads a viable Eighth Amendment claim against Bauer, but not Meli, the court has also considered the other factors enumerated in *Foman*. There is no evidence of bad faith or dilatory motive on Harris's part. As for potential prejudice to defendants generally, and Bauer in particular, trial in this case is set for February of 2015, nearly five months away. Moreover, Bauer will almost certainly be represented by the same defense counsel, who have necessarily been participating in discovery and motion practice already. Although the dispositive motion deadline has passed, the court will grant Bauer leave to move for summary judgment on this new Eighth Amendment claim within sixty days to ensure that he is not prejudiced. Likewise, should Harris wish to move for summary judgment against Bauer, he may do so within sixty days as well. Accordingly, because leave to amend is to be "freely granted when justice so requires," the court grants Harris' motion to amend to add claims against Bauer.

II. Motion for Spoliation Sanctions

Harris also moves for spoliation sanctions based on the alleged failure of the Department of Corrections to preserve a recording of the hallway outside his cell on April 12, 2012 (dkt. #31), which he contends would show that defendant Billington spoke with him on the night of his suicide attempt. Harris also argues that by May 10, 2012, he had filed a Notice of Injury and Claim with the Attorney General, putting defendants on notice

that they had a duty to preserve all evidence relevant to his claims, but that defendants stalled on preserving the evidence until it was irretrievable.

Defendants respond that the video was not destroyed but instead "fell off" the system as part of the routine operation of that system. As relevant context, WCI uses a digital video system employing numerous cameras, which record continuously. (Anthony Meli Decl. (dkt. #35) ¶ 6.) The system stores images for about 30 days before the video automatically loops and records over the oldest data. (*Id.* at ¶ 7.) Unless a person makes an affirmative decision to preserve a particular recording by copying it to a CD, the system does not preserve video recordings. (*See id.* at ¶¶ 7-9.) Defendants have submitted a declaration from Meli, in which he avers that Harris wrote him a letter complaining of Billington's conduct. Meli further avers that he reviewed the video from April 12 but that it did not show Billington had been at or around Harris's cell during the period in question. (*See id.* at ¶¶ 14-16.) Thus, he did not elect to save the video to a CD, and it was eventually overwritten by the system.

As a preliminary matter, it is neither clear that Meli, as a non-party to this suit, had a duty to preserve the video in question, nor that it would be appropriate to sanction Billington for a decision that Meli made. Assuming for the sake of argument that these objections could be overcome, Harris still is not entitled to the drastic sanctions he requests. *First*, he asks for judgment in his favor on liability. Even presuming the video did show Billington at Harris's cell door, that would not prove the merits of Harris's case, since he must prove a serious medical need as well as Billington's knowledge and disregard of that need. *Second*, Harris has asked for an adverse inference -- that is, an instruction that the jury should infer that the video contained incriminatory content. "When considering the

propriety of such an adverse inference instruction, '[t]he crucial element is not that the evidence was destroyed but rather the reason for the destruction.'" *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013). "As the moving party, [Harris] must establish the defendants destroyed the videotapes in bad faith." *Id.* But he has offered "no evidence, other than his own speculation," *Rummery v. Ill. Bell Tel. Co.*, 250 F.3d 553, 558 (7th Cir. 2001), that bad faith played a role in the decision not to save the video.

Third, Harris requests a spoliation charge, which permits but does not require a jury to presume that the lost evidence is both relevant and favorable to the innocent party. For the time being, the court will deny this request without prejudice. At best, Harris has shown that he gave DOC just two days' notice of the need to preserve the video before it would be taped over in the ordinary course. On the other hand, Meli acknowledges having reviewed the video, presumably for possible relevance to Harris's possible claim and with such care that he can aver months later to having looked for and not seen Billington at or around Harris's cell during the relevant period. This raises a question as to why Meli did not simply preserve the tape and whether any adverse inference is appropriate against DOC's agents and defendants here for failing to adopt a policy of preserving potentially relevant video. But to date, at least, Harris has neither demonstrated that *defendants* are personally at fault for the loss of the video, nor demonstrated the importance of the video at this point in the case. *Fourth*, Harris requests $750 to cover his costs in preparing the motion for sanctions. Because the court has not found he is entitled to relief, that request will likewise be denied without prejudice. Harris may renew his motion on or before the deadline for motions *in limine* in this case should he be able to demonstrate prejudice or sanctionable conduct based on the loss of the recording.

III. Motion to Compel

Next, Harris moves to compel production of: (1) unredacted versions of incident reports pertaining to April 12, 2012; (2) documents showing who was Security Supervisor on April 14, 2012; and (3) the Sergeant's Activity Log for April 14, 2012. (Dkt. #41.) That motion will be granted in part and denied in part.[4]

With respect to the activity log, defendants represent that they erroneously sent the wrong log to Harris and that they have since corrected that error. Harris asks that the court nevertheless order defendants to pay his "reasonable expenses," pursuant to Fed. R. Civ. P. 37(a)(5)(A), but Harris's request for $500 in expenses is unsupported by any evidence of the costs he incurred, and it does not appear to the court to be just to impose that sum to compensate him for preparing a two-page motion. *See* Fed. R. Civ. P. 37(a)(5)(A)(iii).

With respect to the other two requests, however, defendants have not responded to Harris's motion in any way. It certainly appears that the incident reports in question would be relevant to Harris's case, since he represents that they contain the names of other inmates who complained of Billington's conduct on April 12 and who could be potential witnesses. Documents identifying the security supervisor are less clearly relevant, but the security supervisor could be a potential witness as well. In any event, defendants have failed to offer any response as to why it should not have to produce that information. With respect to these requests, therefore, Harris's motion is granted, and defendants should produce all responsive materials within fourteen (14) days. Failure to comply timely will result in monetary sanctions.

[4] Harris also filed a motion for leave to file a reply in support of his motion to compel. (Dkt. #50.) The court has read and considered the arguments in his proposed reply, and so that motion is granted.

IV. Motion for Sanctions

Next, Harris asks the court to impose sanctions based on defendants' responses to his First Request for Admissions. (Dkt. #43.) Specifically, Harris asked that defendants admit: (1) that Harris pushed his emergency call button and informed Russell he was suicidal on April 12; (2) Russell followed protocol and informed Billington of Harris's statement; (3) Billington went to Harris's cell; and (4) Billington later left the cell front, "never to return." (*See* Mot. for Sanctions (dkt. #43) 1-2.) Defendants claimed that they lacked sufficient knowledge or information to be able to admit or deny the request, because "[n]o DOC records reflect that the events Harris describes occurred, and neither individual has a detailed recollection of the evening." (Defs.' Br. Opp'n (dkt. #47) 2.)

Harris points to an information/interview request he later obtained through discovery, however, which contains the following language:

> I talked with Sgt. Billington he said Harris called the bubble and said he wasn't feeling well. When Sgt. Billington went to Harris cell Harris would not talk to him when Billington asked what was wrong.

(*See* Meli Decl. Ex. A (dkt. #48) 1.) Harris argues that this proves his version of events and makes clear that defendants' failures to admit were "knowingly false." In response, defendants argue that no one knows who wrote the above paragraph, and that nothing in the record demonstrates that Russell and Billington's denials were made in bad faith.

While the production of Exhibit A to Meli's declaration would appear to belie defendants' representation that no DOC records reflect that Harris pushed the emergency call button or Billington went to Harris's cell, its existence does not clearly demonstrate that defendants Russell and Billington acted in bad faith. Both have apparently represented in

good faith that they have "no detailed recollection of the evening," which is not unreasonable given that it happened back in April of 2012, and the note quoted above does not establish that Harris informed Russell he was feeling suicidal nor that Billington learned of it from Russell. All the note does is suggest that Harris complained and Billington *did* visit Harris's cell. Of course, there *are* consequences to these defendants denying any detailed recollection as to each of the four requests to admit, particularly when it comes to later attempts to deny the accounts of others or the recording of events in an apparently contemporaneous document like Exhibit A. Accordingly, the court will deny the motion for sanctions without prejudice at this time.

V. Motion to Strike

In his brief in reply (dkt. #51), Harris also asks the court to strike Meli's declarations and hold him in contempt for lying under oath.[5] Because Harris raised this request in a brief in reply, defendants have not yet had an opportunity to respond. Accordingly, the court will order defendants to respond to the motion to strike within 14 days. Plaintiff may have 7 days to file a reply.

ORDER

IT IS ORDERED that:

1) Plaintiff Carl Harris's motion for reconsideration (dkt. #28) and motion to reinstate Wayne Bauer and Anthony Meli as defendants (dkt. #36) are DENIED AS MOOT.

2) Plaintiff's motion for leave to file an amended complaint (dkt. #37) is GRANTED IN PART and DENIED IN PART. The proposed amended

[5] Harris invokes Rule 12(f), but that rule only allows a party to strike "redundant, immaterial, impertinent, or scandalous matter" from a *pleading*.

complaint (dkt. #38) is accepted insofar as it pertains to Harris's claims against defendant Bauer, who may have until December 1, 2014, to move for summary judgment.

3) Copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on defendant Wayne Bauer. 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 defendant.

4) Plaintiff's motion for spoliation sanctions (dkt. #31) is DENIED without prejudice to renewal of a motion for spoliation charge and/or monetary sanction if filed by the motion *in limine* deadline of January 6, 2015.

5) Plaintiff's motion to compel (dkt. #41) is GRANTED IN PART and DENIED IN PART consistent with the opinion above.

6) Plaintiff's motion for sanctions (dkt. #43) is DENIED.

7) Plaintiff's motion for leave to file a reply in support of his motion to compel and motion for sanctions (dkt. #50) is GRANTED.

8) Defendants are ordered to respond to plaintiff's motion to strike (contained in dkt. #51) on or before October 14, 2014, with plaintiff to reply on or before October 21, 2014.

Entered this 30th day of September, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge