

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

JAMES TURNER,

Plaintiff,

v.

MICHAEL RATACZAK, MICHAEL MEISNER,
JANEL NICKEL, KEVIN BOODRY,
SANDRA HAUTAMAKI, ROBERT MORRIN
and HOSKINS,

Defendants.

ORDER

13-cv-48-bbc

In this proposed civil action for monetary relief under 42 U.S.C. § 1983, plaintiff James Turner, a prisoner at the Columbia Correctional Institution, contends that defendant Michael Rataczak used excessive force against him, and defendants Michael Meisner, Janel Nickel, Kevin Boodry, Sandra Hautamaki, Robert Morrin and Hoskins violated his constitutional rights by allowing Rataczak to use excessive force against him and by destroying evidence regarding the incident. 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 Michael Rataczak. However, he has not stated a claim against defendants Michael Meisner, Janel Nickel, Kevin Boodry, Sandra Hautamaki, Robert Morrin or Hoskins for violation of his constitutional rights and may not proceed against these defendants.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

At all times relevant to his complaint, plaintiff James Turner was incarcerated at the Columbia Correctional Institution, located in Portage, Wisconsin. The defendants were employees at the Columbia Correctional Institution. Defendant Michael Meisner was Warden and Janel Nickel was the security director. Defendant Sandra Mautamaki was the supervisor for Unit Nine and defendants Robert Morrin and Hoskins were sergeants working on Unit Nine on August 26, 2012. Defendant Michael Rataczak was an officer.

On August 26, 2012, the institution was on lockdown status for the search of Unit Nine and the cells on that unit. Plaintiff was taken to the dayroom, where officers searched

his property. After the search, defendant Rataczak began escorting plaintiff back to his cell on (A) Lower Range of Unit Nine. Plaintiff was wearing handcuffs and a restraint belt around his wrist and waist. While walking down the stairs, plaintiff tripped and tried to catch himself on the railing to stop his fall. Rataczak then slammed plaintiff against the door of (A) Lower Range and punched plaintiff in the face, breaking his glasses and swelling his right eye. Rataczak also slammed plaintiff on the ground, causing him to hit his head and neck on the side of the staircase. Plaintiff suffered a concussion and “a mild degenerative change of the cervical spine.” Rataczak cut his right hand on plaintiff’s glasses and left blood on them.

The incident was videotaped. When plaintiff wrote to defendant Nickel asking to see the footage, she stated that there was no video footage of the incident. Plaintiff also asked defendant Boodry about the broken eyeglasses and Boodry said that the glasses were destroyed.

DISCUSSION

A. Excessive Force

Plaintiff contends that defendant Rataczak 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 Rataczak or any other person, Rataczak slammed plaintiff’s face against the door and floor and punched him in the face, causing plaintiff to suffer a concussion, a neck injury and swelling around the eye. If plaintiff’s allegations are true, he may be able to prove that Rataczak applied force for the sole purpose of harming him. Accordingly, I will allow plaintiff to proceed on his excessive force claim against defendant Rataczak.

Plaintiff may not proceed on an Eighth Amendment claim against the other defendants. Plaintiff alleges that these officials were responsible for the security of inmates on Unit Nine, but the complaint includes no allegations that defendants Meisner, Nickel, Mautamaki, Morrin or Hoskins participated in Rataczak’s actions. 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 these defendants 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.”) (quotation omitted).

B. Destruction of Evidence

Plaintiff also alleges that defendant Nickel is withholding video evidence of the incident and defendant Boodry has destroyed plaintiff’s eyeglasses. Plaintiff may be trying to assert one of two claims, both of which fail. First, he may be arguing that the destruction of evidence has denied him meaningful access to the courts. However, if an individual has firsthand knowledge of the facts and circumstances surrounding the incident, the individual has not been denied meaningful access to the courts, even when a defendant conceals evidence. Thompson v. Boggs, 33 F.3d 847, 852-53 (7th Cir. 1994). Plaintiff can bring this lawsuit without corroborating videotape evidence or his broken eyeglasses because he has firsthand knowledge of the actions the prison officers took against him.

Plaintiff may also be arguing that the destruction, or “spoliation,” of evidence itself violated his rights. Spoliation of evidence is an evidentiary matter, which would arise later in the lawsuit. E.g., J.S. Sweet Co., Inc. v. Sika Chemical Corp., 400 F.3d 1028, 1032 (7th

Cir. 2005). Very few jurisdictions recognize spoliation of evidence as an independent tort, id., and Wisconsin is not one of them. Neumann v. Neumann, 2001 WI App 61 ¶ 80, 242 Wis. 2d 205, 626 N.W. 2d 821.

ORDER

IT IS ORDERED that

1. Plaintiff James Turner is GRANTED leave to proceed on his claim that defendant Michael Rataczak 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 Michael Meisner, Janel Nickel, Kevin Boodry, Sandra Hautamaki, Robert Morrin and Hoskins violated his constitutional rights.

3. 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.

4. 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.

5. 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.

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). This court will notify the officials at the Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 27th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge