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

DARRIN GRUENBERG,

Plaintiff,

v.

OFFICER TRAVIS BITTLEMAN and
CAPTAIN DAVID LIPINSKI,

Defendants.

OPINION AND ORDER

13-cv-453-wmc

Pursuant to 42 U.S.C. § 1983, plaintiff Darrin Gruenberg is suing two correctional officers at the Columbia Correctional Institution ("CCI") for violating his Fourth and Eighth Amendment rights. Gruenberg complains that after being viciously attacked by the correctional officer, he was forced by a correctional captain to endure confinement in a freezing solitary cell for 24 hours as punishment. Because he is a prisoner seeking "redress from a governmental entity or officer or employee of a governmental entity," the court must now determine whether his proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. After examining the complaint, the court concludes that Gruenberg may proceed on his Eighth Amendment claims.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's complaint, the court must read the allegations generously, and hold the complaint "to less stringent standards than formal pleadings

drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Gruenberg alleges, and the court assumes for purposes of this screening order, the following facts.

A. Parties

Plaintiff Darrin Gruenberg is an inmate at the Wisconsin Secure Program Facility, but at the time relevant to this complaint was incarcerated at CCI. Defendant David Lipinski is a correctional captain at CCI. Defendant Travis Bittleman is a correctional officer at CCI.

B. Key Events

On February 11, 2012, Gruenberg was moved to a cell in the DS-1 Unit at CCI. Over the next two days, he repeatedly requested that guards bring him his dental floss, directing his requests to Officer Bittleman, among others. Each time, the guards declined, stating that his floss was still in Gruenberg's old cell in the DS-2 Unit. On February 13, Gruenberg was fed up and decided to protest.

When Officer Bittleman next came by his cell, Gruenberg asked him to open the upper "trap" on his cell door. At the time, Gruenberg was on a "back of cell, low trap" security precaution, meaning items would be passed only through the low trap of the cell door, and only when Gruenberg was standing at the back of the cell. Disregarding this precaution, Officer Bittleman unlatched the top trap of Gruenberg's cell door. Gruenberg claims that he extended his arm through the top trap in a "non-violent gesture of peaceful protest." (Am. Compl., dkt. #6, ¶28.) According to Gruenberg, Bittleman responded by grabbing Gruenberg's arm and violently twisting it. Bittleman knew Gruenberg had no way of escaping the cell or harming him, and Gruenberg alleges this

"attack" on his outstretched arm was unnecessary and done solely to cause Gruenberg pain and injury.

Following the incident, Gruenberg contends that he settled back into his cell and was not causing any disturbance. Nevertheless, Captain Lipinski ordered Gruenberg into controlled segregation. Gruenberg maintains that controlled segregation imposes "atypical and significant hardship onto an offender in relation to the normal incidents and events of segregation housing." (Am. Compl., dkt. #6, ¶165.) In particular, the controlled segregation cell was very cold, and Lipiniski only allowed Gruenberg a black rubber security mat and a segregation smock to keep him warm. Gruenberg was kept in controlled segregation, where he was miserably cold and in pain. Despite his complaints, Captain Lipinski allegedly ordered the guards to keep him there without adequate clothing for over 24 hours.

C. Administrative Proceedings

As a result of his altercation with Officer Bittleman, Gruenberg was charged in a conduct report with battery by a prisoner, threatening an officer, disobeying orders and engaging in disrespectful conduct in violation of Wis. Admin. Code DOC §§ 303.12(1), 303.16(1), 303.24 and 303.25. (*See* Dkt. # 1, Exh. *Conduct Report* # 2160356). According to the conduct report, Gruenberg "thrust his right arm out [of] the trap," grabbing ahold of Officer Bittleman's left wrist, causing injury. When Bittleman secured Gruenberg's right arm outside of the cell, Gruenberg responded by thrusting his left arm out as well. Additional staff on the unit, including a cell-extraction team, were required to subdue Gruenberg and secure the trap door. During the ensuing altercation,

Gruenberg used disrespectful and profane language to threaten the officers with battery and use of bodily fluids. Gruenberg was treated for "superficial scrapes" and escorted to controlled status.

According to the hearing record provided by Gruenberg, the disciplinary adjustment committee found him guilty as charged based on the following:

> Based on review of the conduct report, inmate's testimony and the evidence, the Committee finds it more likely than not that the inmate battered staff by grabbing the officer's left wrist through the trap door causing injuries to [the officer's] left hand. We also find that he disobeyed orders by refusing to pull his arm back in the cell when directed to do so, and by refusing to place his hands out to be restrained. He also made disrespectful threats toward staff by stating, "I'm gonna batter your ass every chance I get you bitch-ass fag. I'm gonna dash your bitch-ass next chance I get."

(Dkt. # 1, Disciplinary Hearing Report). As the result of the committee's findings, Gruenberg was punished with 360 days in disciplinary separation. He also lost exercise privileges for ten days. Among the reasons given for the punishment, the committee noted that Gruenberg's overall disciplinary record is "horrible" and that he had been found guilty of other offenses recently. Sometime after this verdict was entered, Gruenberg was transferred from CCI to WSPF, where he remains in custody.

Despite the administrative findings, Gruenberg now contends that Bittleman used excessive force against him by violently twisting his arm without provocation. Gruenberg contends further that he was moved to controlled segregation by Lipinski without cause to cover for Bittleman's brutal attack on his arm and because of Lipinski's simple animosity towards him. Finally, Gruenberg complains that he was not given a hearing before being put in controlled segregation.

OPINION

I. Excessive Force Claim

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive-force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. *Whitley v. Albers*, 475 U.S. 312, 321 (1986); *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir. 2001). While the extent of injury inflicted is one factor to be considered, the absence of a significant injury does not bar a claim for excessive force so long as the officers used more than minimally necessary amount of force. *Hudson*, 503 U.S. at 9-10.

From the court's review of the pleadings and exhibits provided by Gruenberg, Officer Bittleman's actions may have been excessive or they may have been an appropriate response to Gruenberg's behavior. Assuming that Gruenberg's allegations are true, which is required at this stage of the proceedings, Gruenberg alleges that force was used in excess of any need and that he suffered pain as a result. While the facts may well

prove otherwise, Gruenberg may proceed with his claim that Officer Bittleman severely twisted his arm for no reason other than to cause pain.

II. Conditions of Confinement Claim

Gruenberg alleges that the conditions in his controlled segregation cell were so bad that intentionally keeping him there for 24 hours was itself cruel and unusual punishment. Cruel and unusual conditions are those that "deprive inmates of the minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347. The Eighth Amendment does not "mandate comfortable prisons," and conditions that make confinement unpleasant are not enough to state an Eighth Amendment claim because regular discomforts are "part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 347-49. Notwithstanding this, Gruenberg's allegations of extreme cold, and Captain Lipinski's deliberate indifference to Gruenberg's suffering, suffice (if barely) at the pleading stage to state a conditions of confinement claim. See *Lewis v. Lane*, 816 F.2d 1165 (7th Cir. 1987) (an allegation of inadequate heating may state an Eighth Amendment violation). Accord *Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006).

III. Substantive Due Process Claim

Gruenberg invokes "substantive due process" several times, suggesting that he is asserting a claim under that legal doctrine. However, any such claim is subsumed within his two Eighth Amendment claims already addressed above. "Where a particular

Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 1871 (1989)).

IV. Procedural Due Process Claim

Finally, Gruenberg attempts to assert a procedural due process claim arising out of his 24-hour placement in controlled segregation without a prior hearing. He cannot succeed on this claim because he was not deprived of a liberty interest.

A prisoner challenging the process he was afforded in a prison disciplinary proceeding must show that: (1) he has a life, liberty or property interest that the state has interfered with; and (2) the procedures he was afforded in that deprivation were constitutionally deficient. *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007). Typically, a placement in segregation must extend for several months before a liberty interest is found, and even then only when conditions in segregation are quite harsh. *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697 (7th Cir. 2009).

Here, the alleged conditions were harsh, but the period of confinement was very short. Under the court's reading of Seventh Circuit precedent, Gruenberg has not come close to alleging a liberty interest, and the severity of the conditions in his cell should be dealt with under the rubric of his conditions of confinement claim.

CONCLUSION

While Gruenberg will be allowed to proceed against the named defendants on his Eighth Amendment claims, he should be aware that he will have a significantly higher burden to carry going forward. To prevail on his excessive-force claim, Gruenberg will have to prove that the defendant used force not "in a good-faith effort to maintain or restore discipline," but instead acted "maliciously and sadistically to cause him harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). To prevail on his Eighth Amendment claim based on inadequate prison conditions, Gruenberg must demonstrate that (1) the conditions in the prison were objectively "sufficiently serious so that a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities," and (2) prison officials acted with deliberate indifference to those conditions. *Townsend v. Fuchs*, 522 F.3d 765, 773 (7th Cir. 2008) (internal citations and quotation marks omitted). "[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

ORDER

IT IS ORDERED that:

(1) Plaintiff Darrin Gruenberg's motion for leave to proceed is GRANTED IN PART consistent with the opinion above.

(2) 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 the defendants. 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.

(3) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows 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 plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 7th day of March, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge