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

ADONIS JONES,

Plaintiff,

v.

WARDEN TIM HAINES, *et al*.,

Defendants.

OPINION AND ORDER

14-cv-642-wmc

On June 18, 2015, this court concluded that *pro se* plaintiff Adonis Jones' complaint violated Fed. R. Civ. P. 20 because it included claims that belonged in (at least) three separate lawsuits. Jones was nevertheless given an opportunity to choose *one* of these three lawsuits to proceed under case no. 14-cv-642-wmc. (Dkt. #13.) If he wished to pursue the remaining two lawsuits, he could do so, but he would have to pay a separate filing fee. Otherwise, he could dismiss the other lawsuits without prejudice to refiling them at a later date.

Jones had since responded that he wishes to proceed with what the court previously identified as Lawsuit #1. (Dkt. #14). He also asked the court to dismiss his other claims without prejudice to his refiling them at a later time.

Lawsuit #1 consists of the following claims:

- Officer Martin repeatedly harassed and abused him verbally, physically and sexually;
- Officers Esser and McDaniels participated with Officer Martin in abusing Jones or, at least, failed to protect Jones from abuse by Martin;
- Warden Haines and Security Director Sweeney refused to separate Officer Martin from Jones, transfer Jones to another institution, or otherwise protect Jones from Martin's abuse;

- Deputy Warden Hermanes lied to Jones' family about this abuse; and

- Captain Flannery and Lieutenant Shannon-Sharp endorsed Officer Martin's abuse of Jones, as well as violated Jones' due process rights during an investigation and hearing relating to this alleged abuse.

For the reasons discussed below, Jones may proceed only on his claims that: (1) Officer Martin used excessive force against him; and (2) Officers Esser, Ritchner, McDaniels, Haines, Sweeney, Hermanes and Flannery failed to protect him.

ALLEGATIONS OF FACT[1]

The following allegations from plaintiff's complaint relate to Lawsuit #1.

I. Parties.

Jones is confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. As summarized above, the defendants include the following individuals employed at that institution during the relevant period: Warden Tim Haines; Security Director Jerome Sweeney; Deputy Warden Hermanes; Officer Martin; Officer McDaniel; Captain Flannery; Lieutenant Shannon-Sharpe; and Sergeant Ritchner.

II. Alleged Harassment and Abuse Involving Officer Martin

Officer Martin allegedly harassed and abused Jones on numerous occasions, sometimes in the presence of and even assistance of other defendants. In particular, Jones alleges that:

- From October 2012 through January 2013, Martin used "aggressive grips" on Jones' arms during escorts, "played" with his food trays and yanked on his clothing during pat-down searches.

[1] For purposes of this order, the court assumes the facts above based on the allegations in Jones' complaint. In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

- In March 2013, Martin called Jones a "stupid nigger" and told him he would "break [his] back."

- In May 2013, Martin moved Jones near another inmate so that the other inmate could spit at Jones. Officer Esser was also present during this incident and apparently did nothing to intervene.

- On April 12, 2013, Martin sexually assaulted Jones during a pat-down search by "intentionally rubbing up against [his] genitals twice." Sergeant Ritchner was also present during this incident and apparently did nothing to intervene.

- On April 17, 2013, Martin threatened Jones during an escort, saying "yeah, you gone get yours just watch." Martin and Officer McDaniels then slammed Jones against the door with "aggressive grips," injuring his shoulder joint and both wrists. The officers then cancelled Jones' recreation time for that day.

- On July 28, 2013, Martin banged and kicked Jones' cell, yelling for him to wake up for medication distribution, even though Jones was not scheduled to receive any medication that day.

- On October 15, 2013, Martin used an "aggressive grip" on Jones during an escort. Esser was also present during this incident and apparently did nothing to intervene. Jones asked Martin to loosen his grip, but Martin refused.

- On November 13, 2013, Martin and Esser arrived to escort Jones to a medical appointment. Martin refused to tell Jones which nurse he would be seeing and then claimed falsely that Jones was refusing to leave his cell. Martin then handcuffed Jones so tightly that it cut off blood circulation to his hands and caused him pain. Jones asked Martin and Esser five or six times to loosen the handcuffs, but they refused. Jones' wrists were cut and swollen as a result.

- In January 2014, Martin told Jones, "I got a gun and I know how to shoot, we can't fight in here I'll lose my job."

- On May 14, 2014, Martin opened the trap door to Jones' cell and asked, "How [is] my friend doing?" Jones responded that he was "about to sue him." Martin said "So?" After Jones commented that he had a release date coming up, Martin stated, "Out of all the places to die you gone wanna die at my place."

III. Endorsement of Abuse and Failure to Protect Jones by Multiple Defendants

In light of this alleged conduct, Jones filed multiple complaints with Warden Haines and Security Director Sweeney, asking that Officer Martin not be permitted to pat search or escort him. Jones also asked Sweeney to take him off a two-person escort restriction so that Martin would not need to escort him. Haines and Sweeney denied all of these requests.

Jones' family also called Warden Haines, asking that Jones be transferred to another unit. Haines never acknowledged these requests, nor took measures to intervene on Jones' behalf. Deputy Warden Hermanes also told Jones' family falsely that Jones had not been sexually assaulted.

On January 21, 2014, defendant Captain Flannery conducted an investigation of Jones' complaint regarding the incident that occurred on November 13, 2013, when Martin allegedly handcuffed Jones too tightly. Flannery did not, however, review video from Jones' cell or hallway cameras, nor did he examine Jones' wrists for cuts and scars. Flannery also failed to interview Officer Esser, who was present during the incident. Jones also claims that Esser and Martin lied in their statements regarding this incident.

As a result of Flannery's deficient investigation, Jones was wrongfully charged in a conduct report with lying about staff. Jones was later found guilty following a due process hearing before defendant Lieutenant Shannon-Sharp, for which he was punished with 30 days' room confinement.

OPINION

I. Excessive Force Claims Against Martin, McDaniel and Esser

"The 'unnecessary and wanton infliction of pain' on a prisoner violates his rights under the Eighth Amendment." *Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009) (quoting

Whitley v. Albers, 475 U.S. 312, 319 (1986)). On the other hand, the use of *de minimis* force, so long as it is not of the sort "repugnant to the conscience of mankind," does not implicate the Eighth Amendment. *Id.* (quoting *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)). If force is more than *de minimis*, then the court must consider "whether it 'was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Id.* (quoting *Hudson*, 503 U.S. at 7). The factors relevant in 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 the 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; and any efforts made to temper the severity of a forceful response. *Whitley*, 475 U.S. at 321.

As alleged anyway, Martin's unproved physical altercations with Jones' involved more than *de minimus* force: (1) Martin unnecessarily used aggressively harsh grips on Jones from October 2012 through January 2013, and on October 15, 2013, specifically refused Jones' request for a looser grip due to ongoing injury and pain; (2) Martin sexually assaulted Jones during a pat-down on April 12, 2013; (3) without justification, Martin slammed Jones against a door on April 17, 2013, causing injury to his shoulder and wrists; and (4) Martin handcuffed Jones so tightly it cut off blood circulation and caused pain on November 13, 2013. At the pleading stage, this is enough to reasonably infer that Martin's use of force was excessive.

The same is true for the allegations involving defendants McDaniel and Esser. Jones alleges that: (1) McDaniel was a participant in slamming him against a door on April 17; and (2) Esser participated when Martin refused to loosen the handcuffs on November 13. As

alleged, one might reasonably infer that these defendants were not justified in their use of force against plaintiff. Accordingly, Jones will be allowed to proceed with his excessive force claim against defendants Martin, McDaniel and Esser.

II. Failure to Protect Claims Against Esser, Ritchner, McDaniel, Haines, Sweeney, Hermanes, Flannery and Shannon-Sharpe

The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement," as well as to ensure that "reasonable measures" are taken to guarantee inmate safety and prevent harm. *Farmer v. Brennan*, 511 U.S. 825, 834-35 (1994). An official may be liable if he knew about a constitutional violation and had the ability to intervene, but failed to do so. *Koutnik v.* Brown, 351 F. Supp. 2d 871, 876 (W.D. Wis. 2004) (citing *Fillmore v. Page*, 358 F.3d 496, 505-06 (7th Cir. 2004)). "However, this rule 'is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees.'" *Id.* (quoting *Windle v. City of Marion, Ind.*, 321 F.3d 658, 663 (7th Cir. 2003)). Rather, the failure to intervene must be in "deliberate or reckless disregard" for the inmate's constitutional rights. *Fillmore,* 358 F.3d at 506. Plaintiff's complaint includes claims of failure to intervene against specific defendants who were present during Martin's use of excessive force (Ritchner, Esser and McDaniel),[2] as well as defendants who learned about Martin's actions but failed to intervene (Haines, Sweeney, Hermanes, Flannery and Shannon-Sharpe). Because these two categories involve arguably different analysis, the court will take them up one at a time.

[2] In the court's June 15 Order, the description of Lawsuit #1 did not include Ritchner as one of the defendants. However, Ritchner will be included based on plaintiff's allegation that he was present when Martin allegedly sexually assaulted Jones on the April 12, 2013, and allegedly failed to interfere.

A. Ritchner, Esser and McDaniel

Plaintiff alleges that Ritchner and Esser were each present during instances where Martin used excessive force against plaintiff, but neither did anything to stop Martin. Giving plaintiff substantial leeway at the pleading stage as a *pro se* litigant, there is enough to proceed against Ritchner and Esser consciously disregarding an opportunity to stop Martin. In contrast, the only allegations involving McDaniel are when he acted in concert with Martin. Accordingly, while plaintiff may proceed against him for excessive force as set forth above, plaintiff has not alleged a separate claim for failing to intervene against McDaniel.

B. Haines, Sweeney, Hermanes, Flannery and Shannon-Sharpe

Plaintiff also alleges that he submitted requests to Haines and Sweeney that Martin not be permitted to pat down or escort him, but that they both denied his requests despite Jones' description of the extent of Martin's harassment and assaults. Plaintiff further alleges that his family also tried to call Haines to ask that Jones be transferred to another unit, but Haines did nothing in response. Instead, plaintiff alleges that defendant Hermanes in handling these calls, falsely told plaintiff's family that Jones had not been sexually assaulted. Because plaintiff alleges that Haines, Sweeney and Hermanes were aware of the incidents involving Martin, and none of them took any action, his allegations are sufficient for plaintiff's failure to intervene claim to proceed.

As to defendants Flannery and Shannon-Sharpe, plaintiff claims that Flannery's investigation was deficient and that he lied during the conduct report hearing. Plaintiff further alleges that Shannon-Sharpe punished him based on improper evidence. In particular, plaintiff alleges that Flannery knew about one event involving Martin's use of

force, but did nothing with that information. The allegations do not indicate, however, that Flannery knew about any ongoing use of excessive force, which would have provided the opportunity for him to intervene to stop further assaults by Martin. Yet there is enough to infer that Flannery's failure to intervene may have emboldened Martin and others to continue their assaults, or at least that Flannery recklessly disregarded this risk.

In contrast, the allegations involving defendant Shannon-Sharpe do not establish that he knew about plaintiff's allegations. Rather, it appears from plaintiff's allegations that Shannon-Sharpe knew only what was presented to her during the hearing itself. If, as plaintiff suggests, all of the evidence was improper and based on lies, then Shannon-Sharpe could not have been aware of the facts that give rise to plaintiff's excessive force claims.

Accordingly, plaintiff's failure to intervene claim may go forward as to Ritchner, Esser, Haines, Sweeney, Hermanes and Flannery, but he may not proceed on this claim against McDaniel and Shannon-Sharpe.

III. Due Process Claim Against Flannery and Shannon-Sharpe

Finally, plaintiff alleges that Flannery and Shannon-Sharpe violated his due process rights under the Fourteenth Amendment for upholding the conduct report against him and punishing him for lying about Martin handcuffing him too tightly on November 13, 2013.

A prisoner challenging the process afforded in a prison disciplinary proceeding must show that: (1) he has a liberty or property interest with which the state interfered; and (2) the procedures he was afforded upon that interference were constitutionally deficient. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697 (7th Cir. 2009); *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007). In the absence of a protected liberty or property interest, "the state is free to use any procedures

it chooses, or no procedures at all." *Montgomery v. Anderson*, 262 F.3d 641, 644 (7th Cir. 2001). In the prison context specifically, only deprivations of a liberty interest amounting to an "atypical and significant hardship" would bring the due process clause into play. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). *See also Hardaway v. Meyerhoff*, 734 F.3d 740, 743 (7th Cir. 2013).

Plaintiff does not sufficiently allege that his punishment meets this latter standard as set forth in *Sandin*. Certainly, the 30 days' room confinement imposed here could be construed is a form of segregation, but this form of punishment in a prison setting has been held to be "too trivial" a deprivation to implicate due process rights. *Holly v. Woodfolk*, 415 F.3d 678, 679 (7th Cir. 2005). At least under current law, as this form of segregation is not considered substantially more restrictive than prison conditions plaintiff experiences without room confinement, this punishment did not implicate a liberty interest. *See Wagner v. Hanks*, 128 F.3d 1173, 1174 (7th Cir. 1997) ("[I]t would be difficult . . . to make disciplinary segregation sufficiently more restrictive than the conditions of the general population of such a prison to count as an atypical and significant deprivation of liberty . . . ."). Accordingly, plaintiff's due process claim fails to allege a protectable interest and must be dismissed.

ORDER

IT IS ORDERED that:

1. Plaintiff Adonis Jones GRANTED leave to proceed on his Eighth Amendment claim against Martin, McDaniel and Esser for excessive force, and his Eighth Amendment claim against Ritchner, Esser, Haines, Sweeney, Hermanes and Flannery for failure to intervene.

2. Plaintiff is DENIED leave to proceed on his Eighth Amendment failure to intervene claim against McDaniel and Shannon-Sharpe. He is further DENIED leave to proceed on all remaining claims alleged in the complaint. Defendant Shannon-Sharpe is, therefore, DISMISSED.

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 the 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.

5. Pursuant to an informal 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 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 for the defendant.

6. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 24th day of November, 2015.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge