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

TRACY B. ANDERSON,

Plaintiff,

v.

WILLIAM POLLARD,
LIEUTENANT RADTKE,
CO NEAL, CO WINTERS,
and JOHN DOE,

Defendants.

OPINION AND ORDER

15-cv-785-wmc

Plaintiff Tracy Anderson filed this proposed civil action pursuant to 42 U.S.C. § 1983, claiming that the defendants violated his constitutional and state law rights when they used force while transporting him to segregation. Anderson also filed a Motion for Leave to File an Amended Complaint. (Dkt. #6.) Having been permitted to proceed *in forma pauperis* and paid an initial partial filing fee, his complaint and supplement are ready for screening pursuant to 28 U.S.C. § 1915A. For the reasons set forth below, the court will grant him leave to proceed on his Eighth Amendment and state law claims, but will deny his motion.

ALLEGATIONS OF FACT[1]

Anderson is currently incarcerated at Waupun Correctional Institution ("Waupun"). Defendants are all employees at Waupun. They are William Pollard, the warden; Lieutenant Radtke; Sergeant Price; and correctional officers Neal, Winters and John Doe.

[1] In addressing any pro se litigant's complaint, the court reads the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

On the evening of October 31, 2015, Anderson was summoned to see Sergeant Price, who told him that he was receiving thirty days of no electronics as punishment for a conduct report he received the previous day. As Price was escorting Anderson back to his cell, he told Price that the conduct report was baseless and said, "You racist ass pigs on some bullshit." (Dkt. #1, at 3.) When they arrived at Anderson's cell, Officer Winters was present, and Anderson told them both that they were "racist ass pigs." Winters responded by clenching his fist and saying, "come on fucker!"

At that point, Lieutenant Radtke and Officer Neal also approached Anderson's cell. Radtke, who was holding a taser, instructed Anderson to turn around and put his hands behind his back. Anderson complied, and Neal placed handcuffs on Anderson so tightly that they hurt his wrists. Neal also pushed and shoved Anderson in the process. Lieutenant Radtke then asked Anderson to kneel down so that they could secure his ankles. Again, Anderson complied. Once kneeling and cuffed, Sergeant Price allegedly walked up beside Anderson and struck him on the side of his head, which caused Anderson's head to hit the metal frame of the door. Neal then grabbed Anderson by the back of his neck, pushed his head against the floor, placed his knee on the back of his neck and yelled, "Stop resisting!" Winters also kneed him in the back, while yelling, "Stop resisting" and "Shut the fuck up!" Officers Neal and Winters then lifted Anderson to his feet and bent his wrists in the process, causing Anderson to yell out: "Stop bending my wrists! I'm not resisting!"

After they escorted Anderson out of sight of other prisoners, Sergeant Price, Officers Neal and Winters and another correctional officer, John Doe, allegedly started

punching him in the torso and ribs. When Anderson asked him why they were hitting them, Neal put both of his hands around his neck and started choking him, yelling: "Shut the fuck up before I kill you! Stop resisting!" Although Lieutenant Radtke did not participate, he was present and allegedly did nothing to stop the others from punching and choking Anderson.

The officers then took Anderson to segregation, and Winters handcuffed him to the cell door. Allegedly, one of the cuffs was "as tight as it could be fastened," prompting Winters to comment, "Is that tight enough fucker" before he walked away.

Although Anderson had asked for medical care when he arrived in segregation, he was left in that position until a nurse arrived some forty-five minutes later. When the nurse did arrive, she told Lieutenant Radtke to loosen the cuffs and then told plaintiff Anderson to file a request to be seen for his other injuries. Although Anderson asked him to loosen the cuffs as the nurse had directed, Radtke refused to do so after the nurse left, stating, "I don't take orders from nurses." Finally, Radtke took off the cuffs, and Anderson requested that photos be taken of his wrists, but Radtke refused.

Anderson alleges that as a result of this incident he suffered a lump on the side of his head, headaches, abrasions and cuts to his wrists, as well as bruises on his legs, ankles, ribs and torso. Although Anderson acknowledges that he voiced his dissatisfaction with the officers, he denies resisting or threatening them throughout the above events.

OPINION

I. Warden Pollard

Plaintiff claims that Sergeant Price and Officers Neal, Winters and John Doe used

excessive force against him, and that Lieutenant Radtke was deliberately indifferent to their use of force, all in violation of his Eighth Amendment and state law rights. Although plaintiff also lists Warden Pollard as a defendant, plaintiff does not include any allegations that suggest that he was involved in this incident in any capacity. Generally, a warden or other supervisor may not be held vicariously liable under § 1983 for the conduct of a subordinate (such as an individual correctional officer) unless "with knowledge of the subordinate's conduct, [he or she] approves of the conduct and the basis for it." *Lanigan v. Village of East Hazel Crest, Ill.*, 110 F.3d 467, 477 (7th Cir. 1997); *see also Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001). A warden or supervisor can similarly be held liable if flawed policies or deficient training under their control amount to deliberate indifference to the rights of the persons affected by them. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989) (discussing claim for flawed policies or inadequate training in the context of municipal liability). As plaintiff is not alleging that Warden Pollard somehow approved of the other defendants' alleged misconduct described above, nor that he approved any practice or policy giving rise to that conduct, he will be dismissed as a defendant.

II. Excessive Force

Claims for excessive force in the prison context are governed by the Eighth Amendment. "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)). 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 v. McMillian,* 503 U.S. 1, 7 (1992)). 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 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 for Sergeant Price and Officers Neal, Winters and John Doe, plaintiff has alleged sufficient facts to support a reasonable inference that each used an unnecessary amount of force against him. Neal tightened the handcuffs on plaintiff to such an extent that they injured his wrists; he also kneed him in the back of the neck and choked him; Price struck him on the side of the head when Anderson was kneeling and being cuffed on the ground; and Winters also kneed him in the back. All of these defendants, as well as Officer John Doe, are alleged to have repeatedly, gratuitously punched him in the ribs and torso when Anderson's wrists and ankles were already cuffed.

While Anderson acknowledged yelling at the officers and used derogatory language towards them at several times, he claims to have never threatened the officers or physically resisted. Even if plaintiff's verbal outbursts may have created a threat within a prison setting that the officers were reasonable in attempting to subdue him, the severity of their actions is arguably well beyond what was necessary to address the threat he posed. Accordingly, plaintiff will be allowed to proceed on an excessive force claim

against Price, Neal, Winters and John Doe.

III. Failure to Intervene

Plaintiff further claims that Lieutenant Radtke violated his Eighth Amendment rights by ignoring the constitutional violations by the other officers. 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" of the inmate's constitutional rights. *Fillmore,* 358 F.3d at 506.

Plaintiff's allegation that Lieutenant Radtke was present and did nothing while Price, Neal, Winters and John Doe took him out of the sight of other inmates and then punched and choked him is sufficient to state a deliberate indifference claim against him. These facts suggest that Radtke not only knew that plaintiff was being abused while he was defenseless, but that he was in a position to stop his junior officers' actions and instead did nothing. Plaintiff will, therefore, be permitted to proceed on a deliberate indifference claim against Radtke.

IV. State law claims

Plaintiff also claims that the alleged physical abuse of defendants Price, Neal, Winters and John Doe, along with Radtke's presence and failure to intervene, constituted assault and battery under state law. The exercise of supplemental jurisdiction is appropriate when the state law claims are "so related" to the federal claims that "they form part of the same case or controversy." 28 U.S.C. § 1367(a). Under Wisconsin law, a battery (or assault and battery) is an intentional, unpermitted contact with another. *Estate of Thurman v. City of Milwaukee*, 197 F. Supp. 2d 1141, 1151 (E.D. Wis. 2002) (citing *McCluskey v. Steinhorst*, 45 Wis. 2d 350, 357, 173 N.W.2d 148 (1970)). Since plaintiff's assault and battery claims against Price, Neal, Winters and John Doe stem from the same facts as his excessive force claim, he will be permitted to proceed on these claims. However, plaintiff never alleges that Radtke attempted or made any sort of unpermitted contact with him; nor that he directed or orchestrated any of the actions by the other defendants; he only alleges that Radtke failed to intervene. Accordingly, plaintiff will not be permitted to proceed against Radtke on an assault and battery claim.

V. Motion for Leave to File an Amended Complaint (dkt. #6)

Finally, in his motion to amend, plaintiff seeks to add claims against three previously unnamed defendants -- Sergeant Bouzek and Correctional Officers Noe and Pach -- stemming from an incident that took place on December 20, 2015. While plaintiff may have a federal claim as a result of the December 20 incident, it is too attenuated from the allegations within the original complaint to permit them to be part of the same lawsuit. First, the events giving rise to the claims above took place more than

a month and a half after the October events giving rise to this suit. Second, plaintiff does not name *any* of the present defendants in his amended complaint. These two facts alone are enough to reject the proposed amendments under Fed. R. Civ. P. 20, which permits a plaintiff to join multiple defendants in a lawsuit *only* if: (1) at least one claim against each defendant arises out of the same transaction or series of transactions; and (2) there is a question of law or fact common to all of the defendants. *See George v. Smith,* 507 F.3d 605, 607 (7th Cir. 2007) (stating that a "buckshot complaint" raising unrelated claims against unrelated defendants "should be rejected" by the district court). If plaintiff believes that he has claims related to the December 20th incident, he should pursue it by exhausting his remedies within the prison system and then, if necessary, filing a new complaint and paying the corresponding filing fee.

ORDER

IT IS ORDERED that:

(1) Plaintiff Tracy Anderson's Motion for Leave to File an Amended Complaint (dkt. #6) is DENIED.

(2) Plaintiff is GRANTED leave to proceed on an Eighth Amendment excessive force and state law assault and battery claims against Price, Neal, Winters and John Doe, as well as an Eighth Amendment deliberate indifference claim against Radtke.

(3) Plaintiff is DENIED leave to proceed on any claim against defendant Pollard, who is DISMISSED.

(4) 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.

(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) 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 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 the defendants. Summons will not issue for the John Doe defendant until plaintiff discovers the real name of this party and amends his complaint accordingly.

(7) 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 20th day of June, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge