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

ANTHONY IT,

Plaintiff,

v.

OFFICER BENDERAK, LT. CORNELIUS, SERGEANT CRAFT, OFFICER HOUG, JOHN DOE OFFICERS, LINDSEY WALKER, OFFICER ROWER, OFFICER LLOYD, OFFICER FABREY JR., OFFICER JEZUIT[1] and OFFICER FOSS,

Defendants.

OPINION AND ORDER

18-cv-250-wmc

Pro se plaintiff Anthony It, a prisoner at Columbia Correctional Institution ("Columbia"), has filed a complaint under 42 U.S.C. § 1983, claiming that several Columbia employees violated his Eighth Amendment rights by using excessive force against him after he was already shackled and handcuffed, and in subsequently subjecting him to inhumane conditions of confinement. Plaintiff has since filed a second amended complaint (dkt. #17), which the court will treat as the operative pleading. Since plaintiff is incarcerated and seeking to proceed *in forma pauperis*, the court is required to screen his complaint under 28 US.C. §§ 1915(e)(2), 1915A. For the following reasons, the court will grant plaintiff leave to proceed on Eighth Amendment excessive force and conditions of confinement claims.

[1] While not listed in the caption as a defendant, plaintiff refers to Juzuit as a defendant throughout his complaint, so the court has amended the case caption accordingly.

ALLEGATIONS OF FACT[2]

Plaintiff is currently incarcerated at Columbia, where all the events giving rise to his claims allegedly took place, and where all defendants were working. The listed defendants are: Officer Benderak, Lieutenant Cornelius, Sergeant Craft, Officer Houg, Unit Manager Lindsey Walker, Officer Rower, Officer Lloyd, Officer Fabrey Jr., and Officer Foss. Multiple John Doe officers are also listed, and plaintiff refers to Officer Jezuitas as a defendant throughout his complaint.

On December 12, 2017, plaintiff was being held in restrictive housing. After shackling and handcuffing the plaintiff to escort him to the showers, Sergeant Craft announced that he would not get a shower, apparently because plaintiff "hopped up" too quickly from his bed. Plaintiff then objected that he had done nothing wrong and asked to take his shower. Instead, Craft radioed for support staff and multiple officers responded. after the officers moved plaintiff to a different tier, he alleges that Sergeant Craft, Officer Benderak and multiple other "Doe" officers became aggressive. While plaintiff acknowledges that he became "stiff" at that point, he also claims not to have resisted. Even so, plaintiff claims that all of the officers responded by throwing him down the stairs, even though he remained handcuffed and shackled. While still on the ground and not resisting, plaintiff further claims that Lieutenant Cornelius tazed his back for about ten seconds, before placing him in a restraint chair.

[2] For screening purposes, the court assumes the following facts based on the allegations in plaintiff's complaint, resolving ambiguities and drawing all reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

After a nurse saw plaintiff, he was then taken to the observation cell area, stripped, and tethered to the door. Even though he was allegedly compliant, plaintiff claims staff also slammed his head into the shower door, and someone put an extra pair of shackles on his legs. He was next moved to Observation Cell 46, where the Doe officers, Benderak, Jezuit, Craft and Officer Houg threw him to the ground. While on the ground, Benderak also allegedly punched him in the left cheek, and Jezuit put plaintiff in a choke hold for a prolonged amount of time. Moreover, none of the officers intervened to stop Jezuit. Finally, plaintiff was pulled roughly through a trap door, and even though he was *still* not resisting, Lieutenant Cornelius removed his cuff from his right wrist and tazed his right arm for about seven seconds. Again, none of the officers intervened to stop Cornelius.

Plaintiff allegedly was left in Cell 46 from December 12 through the beginning of February. Plaintiff claims that cell was freezing, and he did not have clothing or bedding, and while plaintiff was able to obtain sheets and clothes from other prisoners, they were stained. Officers also turned both his sink water and toilet water off, while denying him a toothbrush, toilet paper and a mattress. He further had limited access to showers and missed some meals. Finally, plaintiff claims that staff neither cleaned his cell nor provided him access to cleaning supplies for days at a time. As a result, his toilet filled with feces, and he was unable to clean himself. He was also unable to participate in visitation.

Plaintiff claims that defendants Rower, Lloyd, Fabrey Jr., Foss, Craft, Houg and several Doe defendants were all deliberately indifferent to these conditions. In addition, while Walker was in the observation area, plaintiff claims she could both see *and* smell the state of his cell, yet she did nothing to remedy the situation.

OPINION

Plaintiff seeks to proceed against all defendants on Eighth Amendment claims of excessive force and conditions of confinement. The court addresses both below.

I. Excessive Force

For a plaintiff to succeed on an excessive force claim, he must submit evidence that the prison official acted "wantonly or, stated another way, 'maliciously and sadistically for the very purpose of causing harm.'" *Harper v. Albert*, 400 F.3d 1052, 1065 (7th Cir. 2005) (quoting *Wilson v. Seiter*, 501 U.S. 294, 296 (1991)). Relevant factors are: (1) the need for the application of force; (2) the relationship between the need and the amount of force used; (3) the extent of injury inflicted; (4) the extent of threat to the safety of staff and inmates, as reasonably perceived by the responsible officials based on the facts known to them; and (5) any efforts made to temper the severity of a forceful response. *Whitley v. Albers*, 475 U.S. 312, 321 (1986). Because prison officials must sometimes use force to maintain order, the central inquiry is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

Plaintiff's allegations that he was compliant, but still pushed him down a set of stairs, and then punched, tazed and placed him in a chokehold, would if true certainly support a reasonable inference that the named defendants used more force than necessary to ensure plaintiff's compliance, and they did so intending to cause him harm. Obviously, fact-finding will reveal more about whether (and why) plaintiff was punched, tazed

multiple times, and placed in a choke hold, as well as whether (and how) each defendant was individually involved with respect to each use of force. Nevertheless, plaintiff's allegation that he was not resisting throughout the encounter by itself would support a reasonable inference that defendants were not acting in a good faith effort to restore order *and* intended to harm plaintiff. Therefore, the court will grant plaintiff leave to proceed on excessive force claims against defendants Craft, Benderak, Cornelius, Jezuit, Houg and the Doe officers.

Also, plaintiff complains that, while Cornelius tazed him for seven seconds, and Jezuit unnecessarily held him in a choke hold for ten second, the *other* officers present all failed to stop their alleged misuse of force. At least at the pleadings stage, a trier of fact could reasonably infer that any defendant who witnessed the tazing and choke hold (1) could have prevented the allegedly unnecessary use of force and (2) failed to do so. That is sufficient to state a failure to intervene claim. *See 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)) (prison official may be liable for a failure to intervene if he knew about a constitutional violation and had the ability to intervene, but failed to do so "with deliberate or reckless disregard for the plaintiff's constitutional rights"). Accordingly, the court will allow plaintiff to proceed on his failure to intervene claims against defendants Cornelius, Benderak, Craft and the Doe officers for their inaction related to defendant Jezuit's choke hold, and defendants Benderak, Jezuit, Houg, Craft and Doe for failing to intervene during Cornelius's use of the tazer.

II. Conditions of Confinement

Plaintiff also seeks to proceed on Eighth Amendment conditions of confinement claims related to his period of time in Observation Cell 46. Prison officials may violate the Eighth Amendment if they (1) knowingly deprive a prisoner of the minimal civilized measure of life's necessities or (2) subject a prisoner to a substantial risk of serious harm. *Gillis v. Litscher*, 468 F.3d 488, 491 (7th Cir. 2006). To demonstrate that prison conditions violated the Eighth Amendment, a plaintiff must allege facts that satisfy a test consisting of both objective and subjective components. *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994). The *objective* analysis focuses on whether prison conditions were sufficiently serious so that "a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities," *Farmer v. Brennan,* 511 U.S. 825, 834 (1994), or "exceeded contemporary bounds of decency of a mature, civilized society." *Lunsford*, 17 F.3d at 1579. The *subjective* component requires factual allegations supporting a finding that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to plaintiff. *Id.*

Again, at least at the pleading stage, plaintiff's allegations about the conditions of his cell -- cold with no access to adequate clothing, no access to clean linens or toilet paper, no running water or ability to clean his cell -- permit a reasonable inference that plaintiff was denied humane and sanitary conditions of confinement between December 12 and the beginning of February, 2017. In particular, the Seventh Circuit found in *Budd v. Motley*, 711 F.3d 840 (7th Cir. 2013), that "unhygienic conditions, when combined with the jail's failure to provide detainees with a way to clean for themselves with running water or other

supplies, state a claim for relief." *Id*. at 842; *see also Vinning-El v. Long*, 482 F.3d 923, 924 (7th Cir. 2007) (prisoner held in cell for three to six days with no working sink or toilet, floor covered with water, and wall smeared with blood and feces); *Isby v. Clark*, 100 F.3d 502, 505-06 (7th Cir. 1996) (prisoner held in segregation cell that was allegedly "filthy, with dried blood, feces, urine and food on the walls").

As for defendants' alleged deliberate indifference, plaintiff claims that defendants Rower, Lloyd, Fabrey Jr., Foss, Craft, Houg and Walker were all aware that plaintiff was subjected to these conditions but failed to take corrective action. While fact-finding certainly will flesh out each defendant's involvement to a greater degree, these allegations are also sufficient to allow plaintiff to proceed against the named defendants on a conditions of confinement claim.

ORDER

IT IS ORDERED that:

1. Plaintiff Anthony It is GRANTED leave to proceed on:

    (a) Eighth Amendment excessive force claims against defendants Craft, Benderak, Cornelius, Jezuit, Houg and John Doe officers.

    (b) Eighth Amendment conditions of confinement claims against defendants Rower, Lloyd, Fabrey Jr., Foss, Craft, Houg, Walker and John Doe officers.

2. Plaintiff is DENIED leave to proceed on any other claims.

3. 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 60 days from the date of the

Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendants.

4. Summons shall not issue for the Doe defendants until plaintiff identifies these defendants and amends his complaint accordingly. As a result, plaintiff may wish to serve defendants with prompt written discovery asking for assistance in identifying these defendants.

5. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the 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 the defendants or to the defendants' attorney.

6. 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.

7. If plaintiff is transferred or released while this case is pending, it is plaintiff's 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 claims may be dismissed for his failure to prosecute him.

8. Plaintiff's motion to expedite (dkt. #18) is DENIED as moot.

Entered this 6th day of March, 2020.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge