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

ROBERT E. NASH, JR.,

Plaintiff,

v.

SCOTT WALKER, FORMER GOVERNER; ED WALL, FORMER WISCONSIN DOC SECRETARY; JOHN/JANE DOES; YOUTH COUNSELOR MR. LAVICIS; SUPERVISOR BRANDY MAXWELL; PSCYHOLOGIST KARYN MEHRIEDER; YOUTH COUNSELER ADAM; and SUPERVISOR WEBSTER,

Defendants.

OPINION and ORDER

Case No. 19-cv-737-wmc

Pro se plaintiff Robert E. Nash Jr., who was incarcerated at the time he filed this lawsuit, seeks to proceed in this lawsuit under 42 U.S.C. § 1983, on claims that staff at the Lincoln Hills School violated his constitutional rights while detained there as a juvenile in August of 2017. For the reasons that follow, the court will grant Nash leave to proceed under 28 U.S.C. § 1915A on his Eighth Amendment claims against some of the named defendants.

ALLEGATIONS OF FACT[1]

As of August 2017, plaintiff Robert Nash was a detained juvenile at Lincoln Hills. In his proposed complaint, Nash names the following defendants: former Wisconsin governor Scott Walker; former Wisconsin Department of Corrections ("DOC") Secretary Ed Wall; psychologist Karyn Mehrieder; J. Doe 1, a psychiatrist; J. Doe 2, Lincoln Hills' then-superintendent; J. Doe 3, a nurse; J. Doe 4, the psychological supervisor; J. Doe 5, a supervisor; Youth Counselor ("Y.C.") Lavicis; Supervisor Brandy Maxwell; Y.C. Adam; and Supervisor Webster. With the exception of Walker and Wall, all defendants were working at Lincoln Hill School in August of 2017.

During the year leading up to August of 2017, Nash had spent a lot of time on observation status at Lincoln Hills due to his frequent threats of, and attempts at, self-harm. For example, Nash often would bang his head on hard objects until he bled. As a result, Nash's mental health code at Lincoln Hills was MH-2B -- a designation given only to detainees with the most severe mental health issues. Even though he had been diagnosed with certain personality and depression disorders, as well as post-traumatic stress disorder, Nash claims that his only prescribed medication was trazadone, which typically is used as a sleep aid.

Nash claims that Psychiatrist J. Doe 1 was responsible for prescribing this inadequate medication, and further claims that Psychological Supervisor J. Doe 4 failed to ensure that his psychological problems were diagnosed more definitively. More

[1] 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).

specifically, Nash claims that their deficient mental health care caused his act of severe self-harm on August 11, 2017.

Next, at around noon on that day, Nash alleges that he approached Supervisor Maxwell, telling her that his mother was in the hospital, and he needed to talk to someone about it. Maxwell allegedly responded, "I don't have time for your shit; I'm busy," to which Nash replied that he was going to kill himself and ran up a set of stairs that led to a roof. (Compl. (dkt. #1) ¶ 7.) Moreover, once on the roof, Nash allegedly ran to the roof's edge, loudly ranted and sobbed about his mother, and again said he wanted to kill himself. After about 15 minutes, Maxwell and Y.C. Lavicis came onto the roof. Maxwell ordered Lavicis to spray Nash with pepper or tear gas spray, which Lavicis did. When the spray hit Nash's face, however, it allegedly caused him to fall off the roof, landing about 12 feet below onto the ground.

After he landed, Y.C. Adam also dove onto Nash, allegedly injuring his ribs and shoulder. Supervisor Webster then sprayed Nash, blinding him and making him gag. Nevertheless, Supervisor John Doe 5 allegedly refused to provide Nash medical care; instead, he had Nash placed in a cell without a working sink, forcing Nash to use toilet water to try to clean the spray out of his eyes.

Two days later, another nurse, J. Doe 3, examined Nash and denied Nash's request to see a doctor and for x-rays. Ultimately, Doe 3 provided him with nothing more than a sling for his arm. Nash continues to have serious pain in his shoulder, as well as impaired mobility.

Finally, even before August 11, 2017, Nash claims that Governor Walker, DOC Secretary Wall and Lincoln Hills' superintendent J. Doe 1 knew that institution was under investigation by the FBI and the DOC. Furthermore, Nash points out that in the latter half of 2016 and early 2017, there were numerous news articles reporting on the frequency of assaults by Lincoln Hills staff and suicide attempts by juvenile detainees. Moreover, Nash points out that Secretary Wall actually authored a book about his experience working under Governor Walker, stating in particular that Walker directed his staff *not* to inform him about events that took place at Lincoln Hills, in an apparent attempt at plausible deniability. Regardless, none of these defendants are alleged to have taken any affirmative steps to prevent further abuse or ensure that juvenile detainees received adequate mental health care.

OPINION

To start, the court is dismissing defendant Mehrieder because plaintiff has not alleged that this defendant was involved in the events related to his claims. *See Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). As for the remaining defendants, plaintiff's allegations implicate three types of Eighth Amendment claims. *First*, a prisoner may prevail on a claim under the Eighth Amendment by showing that a defendant acted with "deliberate indifference" to a "substantial risk of serious harm" to his health or safety. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). Significant self-harm constitutes serious harm. *Minix*, 597 F.3d at 831. A prison official acts with deliberate indifference to a risk of self-harm if the official is subjectively "aware of the significant likelihood that an inmate

may imminently" harm himself, yet "fail[s] to take reasonable steps to prevent the inmate from performing the act." *Pittman ex rel. Hamilton v. County of Madison, Illinois*, 746 F.3d 766, 776-76 (7th Cir. 2014) (citations omitted).

Plaintiff's allegations related to Psychiatrist Doe 1 and Psychological Supervisor Doe 4 are too vague to support an inference of deliberate indifference. Although it is reasonable to infer that both defendants were generally aware that plaintiff had severe mental health challenges and frequently made attempts to self-harm, plaintiff has not alleged that either Doe 1 or Doe 4 were specifically aware that his medications and frequent placement on observation status were not meeting his immediate mental health needs, nor that he was threatening suicide. Indeed, plaintiff has provided no details about how frequently he met with his mental health providers or shared his current state of mind, much less thoughts of self-harm. In fact, plaintiff does not even allege that he ever had an appointment with either of these defendants related to whether the trazodone was helping him generally or specifically with thoughts of self-harm. Plaintiff may seek leave to amend his complaint to provide additional details about specific interactions he had with these defendants, but as currently pled, it would not be reasonable to infer that Doe 1 or Doe 4 acted with deliberate indifference to the substantial risk that plaintiff would commit self-harm.

That said, plaintiff *will* be allowed to proceed against Supervisor Maxwell on a theory of deliberate indifference, since she allegedly outright ignored plaintiff's statement that he wanted to kill himself after which he immediately ran to the rooftop in an apparent attempt to harm himself.

Second, 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 such factual allegations as the safety threat perceived by the officers, the need for the application of force, the proportionate 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).

Here, plaintiff alleges that Maxwell directed Counselor Lavicis to spray him with pepper or tear gas as he stood on a roof ledge some 12 feet above the ground. At this stage, while certainly not definitive, that allegation is enough to permit an inference that this use of force was wholly inappropriate and could lead to further injury. The same is true as to Supervisor Webster's apparent, subsequent decision to tackle plaintiff, injuring his shoulder, as is Counselor Adam's decision to spray plaintiff again after he had fallen and was on the ground. Certainly, fact-finding may reveal that the operative events were more nuanced, and in particular, that plaintiff was acting in such a dangerous, threatening or disruptive manner to justify some or all of those defendants' actions, but at this stage, it might be reasonable to infer that these defendants were acting with an intent principally (if not only) to harm plaintiff. Accordingly, the court will grant plaintiff leave to proceed

on an Eighth Amendment excessive force claim against defendants Maxwell, Lavicis, Adam, and Webster.

Third, a prison official may violate the Eighth Amendment if the official is "deliberately indifferent" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). "Serious medical needs" include (1) conditions that are life-threatening or that carry risk of permanent serious impairment if left untreated, (2) withholding of medical care that results in needless pain and suffering, or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by consciously failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

Plaintiff's allegations about being sprayed and suffering from a shoulder injury are sufficient to permit an inference that he presented with a serious medical need on August 11. Accordingly, the court will allow plaintiff to proceed on Eighth Amendment deliberate indifference claims against Supervisor J. Doe 5, who allegedly refused to provide him medical care immediately after the fall, and against Nurse J. Doe 3, who allegedly refused to let him see a doctor or order x-rays.

Relatedly, although a greater degree of skepticism, the court also will allow plaintiff to proceed against defendants Walker, Wall and J. Doe 2. To be fair, actions under § 1983 cannot proceed against individuals solely by virtue as their roles as supervisors; to be liable, the supervisor must have "directed the conduct causing the constitutional violation, or . . . it occurred with [his] knowledge or consent." *Sanville v. McCaughtry*, 266 F.3d 724, 739-

40 (7th Cir. 2001). Here, plaintiff has alleged sufficient facts at this early stage to implicate these three defendants, if barely.

To start, it is reasonable to infer that each of them had the ability to take action with respect to policies and practices at Lincoln Hills related to preventing self-harm and the use of excessive force. In particular, plaintiff claims that Governor Walker, Director Wall and Superintendent J. Doe 2 were all aware of the frequent attempts at self-harm and abuse by staff at Lincoln Hills generally; indeed, plaintiff's 2017 injuries *post*-date the investigations into, and publications about, the conditions at Lincoln Hills. Plaintiff further alleges that none of these three individuals took any action to correct those problems. In fact, he alleges they each took steps to *avoid* learning about events that were taking place there.

While these allegations may not suggest that Walker, Wall and J. Doe 2 *directed* staff misconduct and failure to handle mental health care issues properly, it *might* be reasonable to infer that their alleged failure to address allegedly rampant problems with mental health needs and self-harm incidents at Lincoln Hills effectively condoned constitutionally-infirm conditions that led to plaintiff's injuries. Accordingly, the court will grant plaintiff leave to proceed on Eighth Amendment deliberate indifference claims against defendants Walker, Wall and J. Doe 2 as well.

ORDER

IT IS ORDERED that:

1. Plaintiff Robert Nash is GRANTED leave to proceed on:

(a) Eighth Amendment deliberate indifference claims against defendants Maxwell, Doe 3, Doe 5, Walker, Wall and Doe 2.

(b) Eighth Amendment excessive force claims against defendants Maxwell, Lavicis, Adam and Webster.

2. Plaintiff is DENIED leave to proceed on all other claims. Defendants Mehrieder, Doe 1 and Doe 4 are DISMISSED.

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 plaintiff's complaint if it accepts service for the defendants.

4. Summons will not issue for the Doe defendants until plaintiff discovers the real name of these parties and amends his complaint accordingly.

5. For the time being, plaintiff must send the defendant 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 defendant or to defendant’s 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 from custody while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 23rd day of June, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge