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

BRANDON L. PORTER,

Plaintiff,

v.

M. MIESNER, J. NICKEL, CAPT. MORGAN, K. BOODRY, S. SALTER, N. CHRISTENSEN, D. COOPER, P. HOOPER, D. KINGSLAND, J. CICHANOWICZ, T. HAAG, B. HERBRAND, S. GILLEN, P. WALKER, J. REWEY, and S. ASHTON,

Defendants.

OPINION AND ORDER

17-cv-726-wmc

Plaintiff Brandon Porter, a current inmate at Green Bay Correctional Institution, brings suit under § 1983 alleging that the defendants, all employees at Columbia Correctional Institution ("CCI"), violated his Eighth and Fourteenth Amendment rights. Having been permitted to proceed *in former pauperis*, Porter's complaint is now before the court for screening pursuant to 28 U.S.C. § 1915A. For the reasons set forth below, he will be permitted to proceed on some of his claims for excessive force, failure to intervene, cruel and unusual punishment, and deliberate indifference to a serious medical need.

ALLEGATIONS OF FACT[1]

At all relevant times, Porter was an inmate at CCI, and all defendants were correctional officers there. Defendant Miesner was the warden; defendant Nickel was the D.S. 1 and 2 Unit Manager; defendant Boodry was a lieutenant; defendants Morgan and Salter were captains; defendants Cichanowicz, Haag, Hooper, and Kingsland were sergeants; and, finally, defendants Ashton, Christensen, Cooper, Gillen, Herbrand, Rewey, and Walker were

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

correctional officers. Porter purports to sue the defendants in their official and individual capacities for actions they took under color of law.

On August 23, 2012, Porter was housed in cell 33 in the DS-1 segregation unit. Between one and two a.m., one of the defendants turned on the light, waking Porter. The light switches are "on the outside wall next to the cell" in the DS-1 segregation unit. (Compl. (dkt. #1) ¶ 22.) When Porter rolled over in his bed, defendants Haag and Cichanowicz advised that "he was being placed on control status for covering his window" and asked him to approach the door to be handcuffed.[2] (*Id.* ¶ 23.) Porter tried to explain that he had not been feeling well the prior evening, but had not covered his window.[3] Defendant Boodry then pointed his Taser at Porter, warning him that if he did not come to the door, he would be tased. Porter complied, approaching the cell door with his hands behind his back. After both handcuffs and a tether strap were applied, the tether strap connected Porter's right wrist to the outside doorknob.

When the cell door was opened, Porter described seeing numerous "blue shirts" including defendants Christensen, Cichanowicz, Cooper, Haag, Hooper and Kingsland, as well as two "white shirts," defendants Salter and Boodry in the hallway. When instructed to do so, Porter kneeled so leg cuffs could be applied. After being instructed to stand, however, Porter began to feel faint and returned to his knees. Boodry and Cichanowicz then yelled at him to "Stand up!" Porter responded, "Can't ya'll see I'm trying!" and requested assistance standing.

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[2] "Control status" involves being placed in a cell without personal property, clothing or bedding. (*See* Compl. (dkt. #1) ¶ 54.)

[3] On August 22, Porter complained about "extreme pain in his head/facial area," which was making him feel dizzy. (Compl. (dkt. #1) ¶ 24.) He was instructed by defendants Haag and Hooper to fill out a health service form (a "blue slip"), but was not seen by a medical professional. Porter contends that Haag and Hooper indicated in their incident reports that he "looked okay to them." (*Id.*) Porter alleges a history of these symptoms during his incarceration, which previously caused blackouts and required hospital visits because of a possible brain aneurism.

Cichanowicz loudly said, "Okay, now stand up!" as he grabbed Porter's wrist and bent it, causing pain. Porter flinched because of the wrist pain, and defendant Kingsland then put him in a chokehold, making it hard for him to breathe. Following Kingsland's lead, other defendants joined him in ordering Porter to "Stop resisting!" Defendants then placed Porter into a "POSC" position and lifted him into the air "'Superman style' but with his back facing the ground and neck being pulled back so far that he could not breathe." (*Id.* ¶ 34.) Defendant Christensen also covered Porter's nose and mouth for a little more than 10 seconds, causing Porter to fear for his life. At the same time, other defendants applied "pressure point holds" to Porter's feet, sides, collar bone, neck and throat; they also tightened the leg restraints, cutting off Porter's blood flow. With defendants continuing to shout "Stop resisting!" Porter protested that he was not resisting once Christensen uncovered his nose and mouth.

During this time, Porter's right wrist was still tethered to the cell doorknob, as this was pulling his arms away from his body, Porter asked the defendants to "[p]lease stop before ya'll break my arms!" Defendants then put him down, hitting his head while slamming him into the cell door. Defendants then removed the tether so Porter could be escorted off the tier. With Porter now in a control hold, defendants then escorted him backwards, with his head bent back, his arms raised up, and pressure applied to his shoulders and head. In this position, Porter alleges he had trouble breathing and choked while going down the stairs. During the walk to the DS1 observation shower area, defendant Cichanowicz allegedly said, "Keep screaming, that won't stop us. No one can help you now you fucking cry baby. Take it like a man, you said you wanted our help, right? Look at you, you thought you were so tough in G.P., now you're crying like a little girl."[4] (*Id.* ¶ 42.)

[4] Plaintiff notes that "G.P." refers to general population. (Comp. (dkt. #1) ¶ 42.)

Upon arrival in the observation shower area, Porter next claims that unknown defendants slammed his face into the shower door, which had steel bars, and pinned him there. Defendant Hooper then allegedly cut Porter's clothing off and started to search Porter's body, using his hands to rub against Porter's body, including his private areas. Porter told Hooper that if he did not "stop touching me like that, I'm going to scream rape." (*Id.* ¶ 46.) Cichanowicz allegedly instructed Porter to "shut up," because "you know you like it." (*Id.* ¶ 47.) The second time Hooper ran his hand across Porter's rear, Porter jerked and screamed "Rape!" Porter's shout was met with unknown defendants slamming Porter's face into the shower door three times more, cutting his lip in two places, causing blood to streak down his chest and onto the floor.

Seeing and tasting the blood, Porter requested medical attention. Cichanowicz told an unknown defendant to call the health services unit and brought Porter a spit mask. Defendants then wrapped Porter in a towel and brought him to the DS-1 dayroom area, where they strapped him to a restraint chair and wiped the blood off his face and chest. While they waited for Nurse Reda to arrive, defendants allegedly continued to taunt and laugh at Porter.

After Reda arrived, Porter described his injuries, including shooting pain in his face and thumb, and cuts to his lip, ankles and wrists. Reda treated Porter's cuts and scheduled a follow-up appointment with Dr. Saline. Porter was then returned to his cell and placed on control status, where he remained for the next four days, through August 27, 2012.

Once released from control status, Officer Fabry served Porter with two major conduct reports -- CCI #2160212 and #1960040 -- for the above events. These conduct reports were written by defendants Cichanowicz and Haag. While a hearing for both conduct reports was apparently held on September 24, 2012, plaintiff's allegations about how they were resolved become less clear. It seems as though conduct report #2160212 (written by Haag) was

dismissed, while conduct report #1960040 (written by Cichanowicz) was contradicted by Haag's testimony that Porter never tried to hit, elbow or spit at any correctional staff. Both Haag and Cichanowicz further acknowledged being present and seen by Porter during the incident until Porter was escorted away. However, Cichanowicz suggested that Haag did not see Porter's alleged actions because he was not present, despite Haag acknowledging that he was present.

Porter ultimately asked for the dismissal of both conduct reports due to these conflicting statements, but Hearing Officer Morgan only dismissed Haag's conduct report #2160212, while finding Porter guilty under conduct report #1960040, for which he was sentenced to 300 days "D.S. for Disobeying Orders and Battery." (*Id.* ¶ 58.) After Porter appealed, Warden Miesner affirmed Morgan's decision. Finally, Porter asked for an investigation into the officers' involvement, but his requests were ignored, and no investigation occurred.

Porter also had two, follow-up medical appointments. After little movement and approximately two weeks of shooting pain in his right thumb, Porter was seen by both a nurse and Dr. Saline. After the latter appointment, Porter was diagnosed with "temporary nerve damage" caused by a pinched nerve, resulting from handcuffs being too tight on his wrist. Porter then asked to see a neurologist to understand how bad his injury was, but that request was denied. Instead, Porter was given a muscle rub, unknown pain medication, and an X-ray. He was also told that his nerve "will heal naturally." (*Id.* ¶ 61.)

Lastly, Porter engaged in the prison grievance process at CCI related to these events. He filed a formal grievance on November 8, 2012, which was denied on November 21. Porter then appealed that denial on November 28, which was dismissed on January 17, 2013. Porter then sought to file his notice of claim as a John/Jane Doe proceeding, which was also dismissed.

OPINION

The court understands plaintiff's pending complaint to allege claims for: (1) excessive force against defendants Boodry, Christensen, Cichanowicz, Cooper, Gillen, Haag, Hooper, Herbrand, Kingsland, Rewey, Salter and Walker; (2) failure to intervene against all defendants to prevent the excessive force; (3) cruel and unusual punishment, failure to intervene, and equal protection and due process violations against all defendants by "placing the Plaintiff in the segregation unit and conspiring to falsify the conduct report"; and (4) deliberate indifference, as well as due process and equal protection violations, against defendant Miesner and CCI's Security Director for failing to investigate the other defendants' actions.[5] (Compl. (dkt. #1) ¶¶ 64-68.) Possibly unintentionally, plaintiff also appears to allege that he was improperly strip-searched and denied treatment for serious medical needs.

As a preliminary matter, plaintiff will not be able to proceed against defendants Nickel, Ashton, Gillen, Herbrand, Rewey, or Walker because he makes *no* specific allegations against any of them. In fact, their names only appear in the complaint three times: in the caption itself, the section identifying the defendants, and in the legal claims section. Accordingly, these defendants must be dismissed out of hand. *Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation.'" (quoting *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003))).

I. Excessive Force

To succeed on his apparent excessive force claim against defendants Boodry, Christensen, Cichanowicz, Cooper, Haag, Hooper, Kingsland, and Salter, plaintiff must allege

[5] While plaintiff's complaint clearly details the names and ranks of the defendants, it does not specify who served as the Security Director at CCI during the relevant time.

facts sufficient for a reasonable trier of fact to find that each individual 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). Ultimately, 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)).

At this point, plaintiff has only alleged enough facts to move forward on his excessive force claim with respect to defendants Boodry, Cichanowicz, Kingsland, and Christensen. Specifically, plaintiff's complaint alleges that he "was not resisting nor making any threatening gestures," which may make any use of force excessive. (*See* Compl. (dkt. #1) ¶ 64.) Plaintiff further alleges that: (1) Boodry threatened him with a Taser in his cell; (2) Cichanowicz bent his wrist back when he could not stand, and then participated in plaintiff's escort to the observation shower; (3) Kingsland placed him in a chokehold and later participated in putting him in a POSC position and lifting him; and (4) Christensen covered plaintiff's nose and mouth, making it hard for him to breathe. Accordingly, plaintiff may proceed past initial screening against each of these defendants.

As to defendants Haag, Cooper, Hooper, and Salter, however, plaintiff only alleges that they were in the hallway when "unknown defendants" placed him into a POSC position and

lifted him. This is not enough "personal involvement" to move forward on an excessive force claim. *Minix*, F.3d at 833. To the extent that plaintiff believes these defendants were personally involved, whether directly or in a formal supervising role, he may file an amended complaint with specific allegations regarding their involvement. Similarly, if plaintiff does not know the identities of other, unknown defendants, he should pursue written discovery of the present defendants as soon as possible, and then seek leave to amend his complaint further as appropriate.

II. Failure to Intervene

Plaintiff also alleges that all defendants failed to intervene and protect him from: (1) the excessive force used against him; (2) placing him in segregation improperly; and (3) defendants' false conduct report. A 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." *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)).

Plaintiff will be able to proceed against defendants Boodry, Christensen, Cichanowicz, Cooper, Haag, Hooper, Kingsland, and Salter on the first claim of failure to intervene to protect plaintiff from the use of excessive force, since each of these defendants (and perhaps other individuals) were allegedly present in the hallway where the alleged excessive force began. At least for screening purposes, therefore, the court will infer from plaintiff's complaint that these individuals were present, witnessed (and to varying degrees participated in) the excessive force, *and* could have intervened, but failed to do so. As to the other defendants, plaintiff does not allege that they were either present or able to stop the alleged use of excessive force. Accordingly, plaintiff will not be allowed to proceed against the other defendants on his failure

to intervene claim.

With respect to the other two claims regarding failure to intervene in his segregation or filing a false report, however, plaintiff has not alleged that anyone could have intervened and protected him from the decision of Captain Morgan to convict him on the Cichanowicz conduct report. Accordingly, plaintiff cannot proceed on this failure to intervene claim. As to the remaining failure to intervene claims, because he will not be able to proceed on the underlying due process allegations, he cannot proceed on the failure to intervene claims.

III. Due Process

Plaintiff alleges three due process violations: (1) all the defendants violated his due process rights by improperly placing him in segregation; (2) all defendants conspired to falsify a conduct report; and (3) defendant Miesner and the Security Director failed to investigate the other officers' conduct. The Due Process Clause of the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. To prevail on a § 1983 procedural due process claim, however, a plaintiff must demonstrate that he: (1) has a cognizable interest; (2) has suffered a deprivation of that interest; and (3) was denied due process. *Kahn v. Bland*, 630 F.3d 519, 527 (7th Cir. 2010).

Looking first at plaintiff's claim that he was improperly placed in segregation, his allegations do not support a finding that he suffered a loss of liberty. In the prison context, only deprivations of a liberty interest that amount to an "atypical and significant hardship" 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). A prisoner's placement in segregation *may* create such a liberty interest, but "if the length of segregated confinement is

substantial and the record reveals that the conditions of confinement are unusually harsh." *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697-98 (7th Cir. 2009); *see also Townsend v. Cooper*, 759 F.3d 678, 686-87 (7th Cir. 2014). As to the length of confinement, the Seventh Circuit Court of Appeals has not set a bright-line rule, but as much as six months in segregation has been held insufficient to be an atypical and significant hardship, at least absent "exceptionally harsh conditions." *Hardaway v. Meyerhoff*, 734 F.3d 740, 743-44 (7th Cir. 2013) (citing *Marion*, 559 F.3d at 697-98).

Here, plaintiff alleges that he was in "controlled status" for a period of five days, from August 23 through 27, 2012. While he also claims to have been denied access to his personal property, clothing or bedding, the court understands this to mean that he had no access to *his* possessions, not *institution*-provided clothing or bedding. If the court is wrong, plaintiff may replead, detailing any essential materials of daily living to which he was denied access. Even if the court is mistaken and he had no access to *any* clothing or bedding, plaintiff would still need to plead more about the conditions of the cell in which he was housed. For example, he does not allege that the cell was cold or unsanitary, nor that he was uncomfortable or in distress during those five days.

Plaintiff also alleges that following Captain Morgan finding him guilty on the Cichanowicz conduct report, he was sentenced to "300 days D.S." (Compl. (dkt. #1) ¶ 58.) While he alleges that the Warden affirmed Captain Morgan's decision, plaintiff does not allege how much of this sentence he actually served. (*Id.* ¶ 59.) Even if the court inferred that he served all 300 days of this sentence, however, plaintiff has again failed to provide any details with respect to his segregation conditions that would permit the court to infer an "atypical, significant" hardship. *Marion*, 559 F.3d at 697 (citing *Wilkinson v. Austin*, 545 U.S. 209, 214, 224 (2005)). Accordingly, absent repleading, plaintiff cannot proceed on this alleged due

process claim either.

Turning to plaintiff's false conduct report allegation, a prisoner is "entitled to informal, nonadversarial due process." *Westefer v. Neal*, 682 F.3d 679, 684 (7th Cir. 2012) (citing *Wilkinson v. Austin*, 545 U.S. 209, 211-12 (2005)). "Informal due process requires only that the inmate be given an opportunity to present his views" to a neutral decisionmaker. *Id.* at 685 (internal quotation marks and citation omitted). Plaintiff alleges that he requested the dismissal of both conduct reports, and his request was denied as to one of those reports. Plaintiff is *not* challenging the procedure provided to him, nor does he allege a lack of impartiality on the part of Captain Morgan, the hearing officer, or on the part of the Warden, who affirmed the decision. Indeed, the fact that one of the two conduct reports was dismissed through this appeals process would seem to undermine any such claim. Rather, plaintiff seeks to challenge the *result* of that due process. While he might have been able to seek review of a prison disciplinary decision in state court by petition for a writ of certiorari, a federal due process claim is not an available means to seek a review on the merits of the Cichanowicz conduct report. *See State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119-20, 289 N.W.2d 357 (Ct. App. 1980) (prisoner can challenge disciplinary decision by writ of certiorari).

Finally, plaintiff's claim that the Warden failed to respond to his subsequent requests for an investigation into the circumstances surrounding the conduct reports does not sound in due process, since plaintiff had no vested interest in a possible or potential investigation. Thus, he suffered no deprivation of a "cognizable interest" under the Due Process Clause. In particular, the Constitution does not require prisons to enact grievance procedures or to handle grievances in a particular way. *Kervin v. Barnes*, 787 F.3d 833, 835 (7th Cir. 2015) ("[T]he inadequacies of the grievance procedure itself . . . cannot form the basis for a constitutional claim."); *Owens v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievance procedures

are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."). Accordingly, plaintiff will not be able to proceed on any of his due process allegations as pleaded, and Miesner and Morgan will be dismissed.

IV. Cruel and Unusual Punishment

Plaintiff next claims that his being placed in segregation and the defendants' conspiracy to falsify a conduct report constitute cruel and unusual punishment. While this claim is facially meritless, he has pleaded enough to proceed on a cruel and unusual punishment claim for Hooper's conduct during plaintiff's strip search.

With respect to his conditions of confinement claims, the Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). However, to constitute cruel and unusual punishment, conditions of confinement must be extreme. Here, the allegedly improper placement of plaintiff into segregation -- either the five days before the disciplinary hearing or the 300 days thereafter -- does not amount to a violation of the Constitution's prohibition on cruel and unusual punishment for the same reasons that plaintiff's segregation-based due process claims fail: the alleged conditions are simply not severe enough for plaintiff to proceed. *Id*.

On the other hand, plaintiff has alleged enough to proceed on a cruel and unusual punishment claim with respect to the conduct of his strip search. A strip search in prison can violate the Eighth Amendment's prohibition against cruel and unusual punishment if it was "motivated by a desire to harass or humiliate rather than by a legitimate justification" or

"conducted in a harassing manner intended to humiliate and cause psychological pain." *King v. McCarty*, 781 F.3d 889, 897 (7th Cir. 2015) (internal citations omitted); *see also Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009); *Fillmore*, 358 F.3d at 505. For plaintiff to proceed with his challenged search here, therefore, it must have been "calculated harassment" or "maliciously motivated" conduct unrelated to institutional security. *Whitman v. Nesic*, 368 F.3d 931, 934 (7th Cir. 2004); *accord Sparks v. Stutler*, 71 F.3d 259, 262 (7th Cir. 1995) ("The eighth amendment's mental-state requirement . . . supplies protection for honest errors."). For example, in *Mays*, the Seventh Circuit held that a cruel and unusual punishment claim should have gone to the jury where prison officials had conducted daily strip searches of inmates in view of other inmates in a freezing basement by guards who wore dirty gloves and made demeaning comments to the prisoners. 575 F.3d at 650. Likewise, presenting a prisoner to other inmates and guards in a transparent jumpsuit with his genitals exposed could be cruel and unusual punishment. *See King*, 781 F.3d at 897.

Although not pleaded as a separate claim, plaintiff alleges that in front of other guards, defendant Hooper cut his clothing off and inappropriately rubbed his body during a search in the observation shower area and continued to rub plaintiff in the same manner even after plaintiff asked him to stop. Plaintiff adds that defendant Cichanowicz told him to "shut up," because "you know you like it." While Hooper may have had a legitimate reason for conducting a search, plaintiff has alleged enough to move forward on his Eighth Amendment claim because of the allegedly humiliating way in which defendant Hooper conducted the search itself. *See Mays*, 575 F.3d at 649. Plaintiff may also proceed on a failure to intervene claim against defendant Cichanowicz for his failure to stop Hooper.

V. Equal Protection

Plaintiff further alleges that his constitutional rights to equal protection were violated when defendants placed him in segregation, conspired to falsify a conduct report to cover up their improper actions, placed him in segregation on the basis of the false conduct report, and failed to investigate based on his complaints. (Compl. (dkt. #1) ¶¶ 66-68.) The only way to read these allegations under the Equal Protection Clause is as "class of one" allegations. In the Seventh Circuit, a "class of one" discrimination plaintiff must "plead and prove that he was 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Glover v. Dickey*, 668 Fed. Appx. 158, 160 (7th Cir. 2016) (quoting *D.B. ex rel. Kurtis B. Kopp*, 725 F.3d 681, 685-86 (7th Cir. 2013)). However, "[i]f the government official provides a rational basis for the challenged action 'that will be the end of the matter -- animus or no.'" *Id.* (quoting *Fares Pawn, LLC v. Ind. Dep't of Fin. Insts.*, 755 F.3d 839, 845 (7th Cir. 2014)). Here, plaintiff neither alleges that other similarly-situated prisoners were treated differently from him, nor that there was an illegitimate basis for singling him out. Accordingly, plaintiff will not be permitted to proceed with his equal protection claims.

VI. Deliberate Indifference to a Serious Medical Need

Finally, plaintiff raises the specter of two claims for deliberate indifference to a serious medical need: (1) against defendants Haag and Hooper for denying his request for medical attention on August 22, 2012, before telling him to fill out a health service form; and (2) against Nurse Reda for the near two-week delay in follow-up care and against Dr. Saline for denying his request to see a neurologist about his right thumb's pinched nerve. (Compl. (dkt. #1) ¶¶ 24, 60-61.) A prison official may violate the Eighth Amendment if shown to have acted with "deliberate indifference" to an inmate's "serious medical need." *Estelle v. Gamble*, 429 U.S.

97, 104-05 (1976). "Deliberate indifference" means that the official is aware that the prisoner needs medical treatment, but disregards the risk by consciously failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). "A 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Foelker v. Outagamie Cty.*, 394 F.3d 510, 512 (7th Cir. 2005) (quoting *Jackson v. Illinois Medi-Car, Inc.*, 300 F.3d 760, 765 (7th Cir. 2002)). For instance, a medical need may be serious if it causes significant pain. *Cooper v. Casey*, 97 F.3d 914, 916-17 (7th Cir. 1996). A plaintiff can prove deliberate indifference if he can establish an objective element -- that the medical need is actually serious -- and a subjective element -- that the official acted with a "sufficiently culpable state of mind" with actual knowledge of the medical need. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997).

Plaintiff may not proceed on a deliberate indifference claim based only on the instruction by Hooper and Haag to fill out a health services request on August 22. Even though plaintiff alleges that these defendants thought he "looked okay to them," as alleged, plaintiff's thumb and head pain were not conditions for which the need for immediate medical treatment would have been so obvious to a lay person that a failure to bypass normal protocols for requesting medical care, nor does the court find a reasonable basis to infer such an emergency on the facts alleged.

Plaintiff does not name Reda or Saline as defendants, but his allegations do not support a claim against either of them. As to the delayed and limited nature of Nurse Reda's follow-up care, nearly two weeks of inability to move his right thumb and shooting pain may be enough for a lay person to believe that plaintiff obviously required medical attention. Similarly, Dr. Saline's refusal to honor plaintiff's request to see a neurologist. Unfortunately, plaintiff

does not specify *how* he presented to Nurse Reda on August 22, much less how she prevented him from making a follow up health request for two additional weeks. Plaintiff also provides insufficient details as to his specific symptoms that would permit a reasonable jury to infer deliberate indifference in a refusal to refer plaintiff to a neurologist. Accordingly, plaintiff will not be permitted to proceed on a deliberate indifference claim against either defendant, but he may plead this additional detail, should he choose to amend his complaint to include them as defendants.

ORDER

IT IS ORDERED that:

1) Plaintiff Brandon Porter is GRANTED leave to proceed on:

   (a) Eighth Amendment excessive force claims against defendants Boodry, Cichanowicz, Kingsland, and Christensen.

   (b) Eighth Amendment failure to intervene claims against defendants Boodry, Christensen, Cichanowicz, Haag, Cooper, Hooper, Kingsland, and Salter.

   (c) An Eighth Amendment claim against defendant Hooper related to the strip search.

   (d) An Eighth Amendment failure to intervene claim against Cichanowicz related to Hooper's strip search.

2) Plaintiff is DENIED leave to proceed on any other claims, and defendants Miesner, Morgan, Ashton, Nickel, Gillen, Herbrand, Rewey, and Walker are DISMISSED.

3) Plaintiff may have until May 21, 2020, to submit an amended complaint, as detailed above.

4) 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 state 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.

5) 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.

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 his obligation to inform the court of his new address. If he fails to do this and defendants or the court is unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 21st day of April, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge