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

THEODORE SMITH,

Plaintiff,

v.

DR. LAVENE, et al.,

Defendants.

OPINION and ORDER

Case No. 17-cv-70-wmc

Pro se plaintiff Theodore Smith, an inmate at Columbia Correctional Institution ("Columbia") filed this lawsuit under 42 U.S.C. § 1983, and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-2(b), claiming that various Wisconsin Department of Corrections ("DOC") employees working at Columbia violated his constitutional and statutory rights. His complaint is subject to screening as required by 28 U.S.C. § 1915A, and for the reasons that follow, Smith will be granted leave to proceed against some of the named defendants.

ALLEGATIONS OF FACT[1]

At all relevant times, plaintiff Theodore smith was incarcerated at Columbia, where each of the defendants worked. Smith had been transferred to Columbia in February of 2016, and the events giving rise to his claims in this lawsuit took place when he was housed in segregation there between February 2016 and early 2017. The defendants include: psychiatrists Dr. Lavene, John Doe, Gamboro, and White; Lieutenants Anderson and

[1] Except as expressly noted, the following, alleged facts are assumed true for screening purposes and viewed in a light most favorable to plaintiff.

Bussie; Officers Brockman, Toby, Roeker, Swenson, Newstander, Doyle, and John Does 1-5, Food Service Supervisor John Doe, Teslike, Knapp, and Pitphitzen. Plaintiff's complaint sets forth two distinct sets of events that give rise to his claims as summarized below.

I. Mental Health Care and Excessive Force Between February and December of 2016

While plaintiff acknowledges receiving psychotropic medications at Columbia to treat his depression, bipolar disorder and schizophrenia, he claims that Doctors John Doe, Lavene, and Gamboro failed to provide *proper* medications to treat his various mental illnesses. As a result of being improperly medicated, Smith further claims that he started hearing voices and was placed in segregation, which resulted in physical altercations with officers and his being tazed, beat up and placed in a restraint chair for long periods of time.

Smith describes one incident in particular in April of 2016 in which he ran out of his cell after seeing a woman that he believed to be the devil's wife, at which point Smith was confronted by a "cell extraction team," including Lieutenant Bussie and officers John Doe 1-4, who allegedly (1) threw him to the ground, (2) punched him in the face, ribs and legs, and (3) stomped on him. Unsurprisingly, all of this caused Smith to swell and bleed. Smith alleges that Lieutenant Bussie then instructed the other officers to put a spit mask on Smith to hide his bruises during a visit with a nurse.

Smith further claims that on December 1, 2016, officer Brockman denied him his Muslim food tray. Apparently in response to Smith objecting to this denial, a cell extraction team again came into his cell, threw him on the ground, kneed and punched him; Pitphitzen administered O.C. spray on him; and he was placed in segregation, where

he was held in a restraint chair. Smith further claims that Dr. Gamboro then came and spoke with him in that room with Lieutenant Anderson present. Apparently, at some point, Anderson told Gamboro to leave, after which Anderson, along with officers Swenson and John Doe 5, forced Smith out of the restraint chair and moved him to a cell, while kneeing and punching him along the way.

After this exchange, Smith allegedly *begged* Anderson, Swenson and Doe 5 not to leave him in the cell alone because he was hearing voices that told him to kill himself. When he tried to get out of the cell, Anderson tazed him. Smith then started biting himself to the point where he made himself bleed. Despite Anderson and Doyle both seeing this, Smith alleges that they left him bloodied in his cell the rest of the day. Smith further claims that his injuries went untreated for the next *two* days.

Ultimately, Smith appears to have received a conduct report as a result of this incident, having included allegations challenging the validity of a due process hearing, but he does not include any information about who was present at the hearing, what the outcome was, or how these allegations are tied to any of his claims.

Finally, Smith includes a few paragraphs about an incident in December of 2016 in which Officer Newstader slammed Smith's hand in a lower trap door. He does not describe the circumstances surrounding this incident, but does allege that he received some treatment from a nurse for the injury.

II. Observance of Ramadan, Subsequent Suicide Attempt and Conditions of Confinement

Smith separately alleges that he asked chaplain Teslik, who is *not* a defendant, about observing Ramadan, but that his inquiries went unanswered in 2016 and again in 2017. So frustrated was he by the lack of response to his requests about Ramadan, Smith alleges that he actually started hearing voices again by January 2017, telling him to kill himself. Smith then allegedly asked officers Toby and Roeker if he could be placed in a restraint chair for protection from his own impulses, but they reportedly just laughed at him and ignored his request. Smith then attempted to hang himself, and even though Toby and Roeker saw him hanging, they again ignored him. Apparently after several minutes Roeker came back, however, saw him still hanging and called Anderson. Roeker and Anderson then allegedly entered Smith's cell, punched him in the eye, threw him to the ground, and dragged him down the hall. At that point, Smith was placed in a restraint chair for about two hours, then moved to a cold cell for three days without clothes, a blanket or mattress. Even though he asked for treatment during this period, Smith alleges that no one responded, even when he asked for inhalers for his asthma.

During an unspecified, several-month stay in segregation, Smith also alleges that he was forced to eat cold Ramadan meals. Smith does not, however, include allegations about *who* he complained to about this, but still claims to have complained to someone at Columbia that the meals caused him extreme stomach pains. He adds that the guards would leave the food in the hallways, adding to a terrible stench that already included the smell of urine and feces, and that guards Roeker, Knapp and Newstader would nevertheless let his Ramadan meal tray sit on the floor for hours gathering hair.

Finally, during his time in segregation Smith alleges more generally that he did not have clean clothing in his size nor clean sheets. Smith does not, however, allege that he complained about these conditions, that any of the named defendants knew about them, or that they were in a position to provide him clean clothing on a more frequent basis.

OPINION

The court understands Smith to be asserting claims under the Eighth Amendment and RLUIPA. Before delving into whether he may proceed on either basis, however, the court must first dismiss several defendants for lack of personal involvement. *Backes v. Village of Peoria Heights, Ill.*, 662 F.3d 866, 869 (7th Cir. 2011) (recognizing the "well-established principle of law that a defendant must have been 'personally responsible' for the deprivation of the right at the root of a § 1983 claim for that claim to succeed"). While plaintiff names as defendants White, Brockman, Food Service Supervisor John Doe, Teslik, Knapp and Pitphitzen, he has not included *any* allegations suggesting that they were personally involved in, much less responsible for, any of the events described above. Accordingly, they will be dismissed without further discussion.

I. Eighth Amendment

Plaintiff's allegations suggest that he would like to proceed on three types of Eighth Amendment claims: excessive force; deliberate indifference to serious medical needs; and conditions of confinement that constitute cruel and unusual punishment.

A. Excessive Force

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 such a 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 factual allegations revealing 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 that force. *Whitley v. Albers*, 475 U.S. 312, 321 (1986); *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir. 2001).

Plaintiff outlines four incidents in which multiple defendants allegedly used excessive force against him, three of which occurred in December 2016. The first of the December incidents involved Lieutenant Bussie and officers Doe 1-4, who allegedly punched plaintiff in the face, ribs and legs when he ran out of his cell during a hallucination, and then "stomped" on him. Second, on December 1, 2016, Lieutenant Anderson and Officers Swenson and Doe 5 allegedly kneed and punched him as they moved him back to his cell, and Pitphitzen used O.C. spray on him. Third, at some point in December, Officer Newstader, apparently unprovoked, slammed his hand in a lower trap door. The fourth incident occurred in January of 2017, when Officer Roeker and Lieutenant Anderson entered plaintiff's cell after his attempted hanging, and as part of taking him down,

allegedly punched him in the eye, threw him on the ground and dragged him down the hall.

At least as alleged, none of the defendants was justified in using the types of force that they used upon plaintiff. While the facts may bear out that some or all of the actions were genuine attempts to restore order or security, the court must, therefore, infer at this stage that defendants were acting maliciously towards plaintiff. Accordingly, the court will permit plaintiff to proceed on excessive force claims against Bussie, Doe 1-4, Anderson, Swenson, Doe 5, Roeker, Newstader and Pitphitzen arising out of their alleged involvement in these four incidents.[2]

B. Deliberate Indifference

A prison official violates the Eighth Amendment in acting with "deliberate[] indifferen[ce]" 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 official disregards a known risk to a prisoner in need of medical treatment by consciously failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

[2] At this point, the court will also assume without deciding that these four incidents are sufficiently interwoven in time and in relation to his deliberate indifference claims to be considered together under Fed. R. Civ. P. 20.

Allegations of delayed care, even a delay of just a few days, may violate the Eighth Amendment if the delay caused the inmate's condition to worsen or unnecessarily prolonged his pain. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010) ("[T]he length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment.") (citations omitted); *Smith v. Knox County Jail*, 666 F.3d 1037, 1039-40 (7th Cir. 2012); *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011). Under this standard, plaintiff's claim has three elements:

1. Did plaintiff objectively need medical treatment?
2. Did defendants know that plaintiff needed treatment?
3. Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

Here, plaintiff alleges two types of serious medical needs, the first relating to his mental health needs and the second relating to his claim that the Ramadan meal bags made him sick. As to his mental health needs, suicide and suicide attempts pose a serious risk to a prisoner's health and safety. *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996). Plaintiff's threats of self-harm coupled with his need for medication and reports of hallucinations are sufficient to permit an inference that he posed a serious risk of harm to himself in 2016 and 2017. Since plaintiff alleges that Drs. John Doe, Lavene and Gamboro were each involved in his mental health care, the court will evaluate whether plaintiff has alleged facts sufficient to state a claim against each of them.

As an initial matter, however, while plaintiff alleges generally that these three defendants failed to treat his mental health needs, he does not include any details about

what each of these doctors knew, *when* they knew about his needs, and how their actions exhibited a conscious failure to take reasonable steps to treat him appropriately. Conclusory statements that they failed to treat him is not sufficiently tied to factual allegations to permit an inference that these defendants were deliberately indifferent to his general medical needs or a specific risk that he would harm himself. In particular, plaintiff does not mention Doe or Lavene at any other point in his complaint, and he may not proceed on a deliberate indifference claim against them. Accordingly, both will be dismissed.

In fairness, however, plaintiff does allege that Dr. Gamboro was present and speaking with plaintiff on December 1, 2016, after he was placed in a restraint chair. Apparently, Gamboro then left the room after Lieutenant Anderson told him to do so. While it is reasonable to infer that plaintiff was dealing with severe mental health issues that day and that Gamboro knew about it, it is unclear exactly what plaintiff told Gamboro that day. Accepting as true that Gamboro was involved in treating plaintiff's mental illnesses, one might infer that Gamboro left the room without ensuring that plaintiff's mental health needs were being addressed sufficiently. Moreover, at least as alleged, this left plaintiff with the officers, who handled him roughly and put him back in a cell where he proceeded to bite himself to the point of bleeding. As currently pled, therefore, it may be reasonable to infer that Dr. Gamboro's failure to step in to provide plaintiff with additional treatment or attention that day, after arguably exhibiting acute issues related to known mental illnesses, constituted deliberate indifference to his medical needs and risk that he would harm himself. Accordingly, the court will permit plaintiff to proceed on a

deliberate indifference claim against Dr. Gamboro related to his failure to provide further treatment on December 1, 2016.

Plaintiff's allegations about his threats of self-harm also implicate defendants Anderson, Swenson, John Doe 5, Doyle, Toby and Roeker. Specifically, plaintiff alleges that Anderson, Swenson and Doe 5 ignored his credible threats that he would kill himself on December 1, then they left him alone in a cell without taking measures to notify medical staff or adequately prevent self-harm. Further, plaintiff alleges that after later finding him bleeding from self-inflicted bites, Officers Anderson and Doyle left him bloodied in his cell for two more days. Similarly, plaintiff alleges that in January of 2017, Officers Toby and Roeker simply laughed at him when he threatened to hurt himself and asked to be placed in a restraint chair, then ignored plaintiff when he tried to hang himself. While plaintiff has not provided specific details about these incidents, he has alleged enough to permit an inference that defendants Anderson, Swenson, Doe 5, Doyle, Toby and Roeker each acted with deliberate indifference to either his credible threats of self-harm or actual attempts at self-harm. As such, the court will grant plaintiff leave to proceed against each of them on claims of deliberate indifference.

As to plaintiff's separate claim about the Ramadan meal bags, however, plaintiff's allegations do not state a claim against any of the defendants. For one, while plaintiff alleges that the meals made him sick to his stomach, this fact alone does not support a finding that he was suffering from a serious medical need. Indeed, he does not allege how long he was sick, the severity of his illness or any lingering effects from his illness. Without more, these allegations do not support an inference that he was so sick that he needed

treatment or faced the risk of serious harm. More importantly, plaintiff does not allege that *any* of the named defendants actually knew that the meal bags were making him sick, nor that any of the defendants failed to address his sickness in a wholly inappropriate manner. Accordingly, the court will not permit plaintiff to proceed on a deliberate indifference claim related to the Ramadan meal bags.

C. Conditions of Confinement

Finally, plaintiff's allegations that his segregation cell was cold, that he lacked clean sheets and clothing in his size, and that his Ramadan meal bags were left outside his cell for long periods of time suggest an Eighth Amendment claim related to his conditions of confinement. Prison officials may violate the Eighth Amendment if they knowingly deprive a prisoner of the minimal civilized measure of life's necessities or subject a prisoner to a substantial risk of serious harm. *Gillis v. Litscher*, 468 F.3d 488, 491 (7th Cir. 2006). Here, although not as severe as most cases allowed to proceed, plaintiff's various allegations about the conditions of his confinement -- the cold, lack of access to proper clothing and sheets, and the left-behind meal bags -- are sufficient to permit an inference that he experienced conditions that may have fallen below the minimum of civilized society's standards. *See e.g. Budd v. Motley*, 711 F.3d 840, 842 (7th Cir. 2013) ("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"); *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 walls smeared with blood and feces); *Isby v. Clark*,

100 F.3d 502, 505–06 (7th Cir. 1996) (prisoner held in segregation cell that allegedly was "filthy, with dried blood, feces, urine and food on the walls"); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992) (prisoner held in cell that allegedly was filthy and smelled of human waste, lacked adequate heating, contained dirty bedding, and had "rusted out" toilets, no toilet paper, and black worms in the drinking water).

However, here again, plaintiff does not allege that *any* of the named defendants knew about the cold cell or the lack of adequate clothing or sheets, so he cannot proceed on a claim related to those conditions. He *does* allege that he told Officers Roeker, Knapp and Newstader that his Ramadan meal bags sat in the hallway for long periods of time and contributed to the already retched smell of urine and feces, and they failed to take corrective action. As such, plaintiff will be permitted to proceed against those three defendants on a conditions of confinement claim related to their failure to address the Ramadan meal bags and related filth.

II. First Amendment

Plaintiff's allegations related to his desire to observe Ramadan suggest that he may also wish to pursue a First Amendment free exercise claim. In the prison context, to establish a Free Exercise violation, plaintiffs must demonstrate that he has a sincere religious belief and that defendants' "placed a substantial burden on his religious practices." *Thompson v. Holm*, 809 F.3d 376, 379 (7th Cir.2016). Once plaintiff makes that showing, he also must show that the burden on his right is "not reasonably related to a

legitimate penological interest." *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 96 L.Ed.2d 64 (1987)).

Here, plaintiff adequately alleges that he is a practicing Muslim and desired to observe Ramadan in 2016 and 2017, so the court will accept that he has a sincerely held religious belief that has been substantially burdened. However, plaintiff has not alleged that any of the named defendants were involved in denying his request to observe Ramadan, so he has not identified any defendant that could be held personally responsible under § 1983. While plaintiff may seek leave to amend his complaint to name as defendants the individual or individuals that denied his requests to observe Ramadan, plaintiff may not proceed on this claim as currently pled. Even if he were to amend his complaint, it is at best unclear that this or his RLUIPA claim would not be more appropriately pursued as a separate lawsuit under Rule 20.

III. RLUIPA

Under RLUIPA, the plaintiff has the initial burden to show that he has a sincere religious belief and that his religious exercise was substantially burdened. 42 U.S.C. § 2000cc-1(a); *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). If the plaintiff makes the showing, the burden shifts to the defendants to show that their actions further a "compelling governmental interest" and do so by "the least restrictive means." *Id.*; *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (citing *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2774, n. 28 (2014)). If a plaintiff prevails on a RLUIPA claim, he is limited to declaratory and

injunctive relief; he cannot obtain money damages. *Grayson v. Schuler*, 666 F.3d 450, 451 (7th Cir. 2012).

Plaintiff claims that he was unable to celebrate Ramadan in 2016 and 2017, but he does not allege that the issue is ongoing. Moreover, while plaintiff is requesting injunctive relief related to his mental health care, he is not seeking an injunction relating to his desire to observe Ramadan. Accordingly, as monetary damages are not available under RLUIPA, plaintiff may not proceed on this claim as pleaded.

ORDER

IT IS ORDERED that:

1. Plaintiff Theodore Smith is GRANTED leave to proceed on:

   (a) Eighth Amendment deliberate indifference claims against defendants Gamboro, Anderson, Swenson, John Doe 5, Doyle, Toby and Roeker.

   (b) Eighth Amendment excessive force claims against defendants Bussie, John Doe 1-4, Anderson, Swenson, Doe 5, Roeker, Newstader and Pitphitzen.

   (c) Eighth Amendment conditions of confinement claim against defendants Roeker, Knapp and Newstader.

2. Plaintiff is DENIED leave to proceed on all other claims and defendants White, Brockman, Food Service Supervisor John Doe, Dr. John Doe, Lavene and Teslike are DISMISSED from this lawsuit.

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

4. 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 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 the defendant or to 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. 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 8th day of January, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge