UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BRYAN ALLEN CARY,

Plaintiff, Case No. 2:16-cv-29

v. Honorable R. Allan Edgar

ROBERT NAPEL,

Defendants.
_____/

OPINION

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983. The Court has granted Plaintiff leave to proceed *in forma pauperis*. Under the Prison Litigation Reform Act, PUB. L. NO. 104-134, 110 STAT. 1321 (1996), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, the Court will dismiss Plaintiff's complaint for failure to state a claim against Defendants Unknown Parties ##7-10. The Court will serve the complaint against Defendants Napel, Alexander, Huss, Niemisto, Robare, Contrares, Schroderus, Caron and Unknown Parties ##1-6.

Discussion

I. Factual allegations

Plaintiff Bryan Allen Cary, a state prisoner currently confined at the Carson City Correctional Facility, filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against Defendants Warden Robert Napel, Deputy Warden Unknown Alexander, Deputy Warden Unknown Huss, Inspector Unknown Niemisto, Psychologist Unknown Robare, Inspector Unknown Contrares, Corrections Officer Unknown Schroderus, Grievance Coordinator Glenn Caron, and Unknown Parties ##1-10.

In his complaint, Plaintiff alleges that while he was confined at the Marquette Branch Prison (MBP), he provided information on gang activities, drugs, and weapons to Defendants Contrares and Schroderus, as well as to Officers Larock and Pelkola. On October 4, 2013, Defendant Contrares had Officer Larock falsify a misconduct on Plaintiff, which resulted in his placement in segregation. The misconduct ticket was dismissed and Plaintiff claims that this dismissal was used as a "bully tactic" to force Plaintiff to provide more information to prison officials. Plaintiff did provide more information, but also filed a grievance on Defendant Contrares. Defendant Contrares "harassed" Plaintiff in response to the grievance by telling inmates and other staff that Plaintiff was an informant. A gang member was sent to stab Plaintiff, but Plaintiff defended himself and broke his assailant's jaw. Defendant Contrares wrote a misconduct ticket on Plaintiff for the incident. Plaintiff identified his assailant, who was searched. "Shanks" were discovered in the assailant's possession. As a result, Plaintiff's assailant received a misconduct. Plaintiff subsequently received a note from his assailant, inmate Sanders, stating that Defendant Contrares had told him that Plaintiff had informed on him. Inmate Sanders also told other prisoners

that Plaintiff was an informant. Plaintiff showed Defendant Niemisto the note he had received from inmate Sanders. Plaintiff also wrote to Defendants Alexander, Huss, and Napel, explaining the situation and seeking protection.

Plaintiff filed several grievances seeking protection or a transfer, which led to his transfer to segregation. After six months in segregation, Plaintiff was forced to go to the general population. After two months in the general population, Plaintiff received drugs in the mail and was returned to segregation. Plaintiff claims that the drugs were sent at the direction of other inmates because they wanted to have Plaintiff placed in the hole for being a "rat." Within thirty days, Plaintiff was again forced to the general population with the threat of a misconduct if he did not go. Plaintiff spent six months in the general population, during which he only went to the shower and the yard eight to ten times in an effort to avoid conflict. On November 5, 2015, Defendant Schroderus told Plaintiff that he was aware of the "hit" on Plaintiff and would get him transferred as fast as possible. On November 7, 2015, Plaintiff went to the yard and was attacked from behind by inmate Pagan. Plaintiff defended himself and was found guilty of fighting and placed in segregation. Plaintiff claims that Unknown Parties ##1-6 used excessive force against him in breaking up the fight, which involved the unnecessary use of tazers and pepper spray, as well as physical force. As a result, Plaintiff claims to suffer from four holes (from the tazer) in the middle of his neck, burning eyes, nose, and throat, a small cut on his left cheek, a bloody and painful nose, and pain in his thumbs and wrists.

Plaintiff claims that there is now a "stab on sight" order on him, which means that if gang members have an opportunity to stab him, the failure to do so will get them stabbed by other members of their own gang. Plaintiff's requests for a transfer or protection were refused. Plaintiff

spoke to Defendant Robare, but all she did was ask if Plaintiff was in a gang or if he was a snitch. Defendant Robare knows that Plaintiff is a "cutter" but refused to take measures to help him.

On December 28, 2015, Plaintiff purposely cut his arm so badly that he required nineteen stitches. Plaintiff told Defendant Robare that he was going to cut himself, and she said "whatever." On January 6, 2016, Plaintiff was placed in a suicide cell by Defendant Unknown Parties ##7-10, and his clothes were taken. However, Defendants Unknown Parties ##7-10 failed to discover that Plaintiff had a razor hidden in his mouth. Despite the fact that rounds were done every fifteen minutes, Plaintiff gave himself a six inch long injury, which required twenty stitches. Plaintiff states that he has bipolar disorder with depression, anxiety, stress, and fear, and he takes medication. Plaintiff contends that when his disorder "overloads," he cuts himself. Plaintiff claims that Defendants Robare and Unknown Parties ##7-10 failed to protect him from injuring himself.

Plaintiff contends that Defendants violated his Eighth Amendment rights by labeling him as a snitch, and by failing to protect him from other inmates and from himself. Plaintiff also claims that he was subjected to excessive force by Defendants Unknown Parties ##1-6 when they broke up the fight between himself and inmate Pagan. Plaintiff seeks compensatory and punitive damages, as well as equitable relief.

II. Failure to state a claim

A complaint may be dismissed for failure to state a claim if it fails "'to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 679. Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)); *see also Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(i)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

To state a claim under 42 U.S.C. § 1983, the plaintiff must plead and prove that the defendant, while acting under color of state law, deprived him of some right or privilege guaranteed by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

Inmates have a constitutionally protected right to personal safety grounded in the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). Thus, prison staff are obliged "to take reasonable measures to guarantee the safety of the inmates" in their care. *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984). To establish a violation of this right, Plaintiff must show that Defendant was deliberately indifferent to the Plaintiff's risk of injury. *Walker v. Norris*, 917 F.2d 1449, 1453 (6th Cir. 1990); *McGhee v. Foltz*, 852 F.2d 876, 880-81 (6th Cir. 1988). While a prisoner does not need to prove that he has been the victim of an actual attack to bring a personal safety claim, he must at least establish that he reasonably fears such an attack. *Thompson v. County of Medina, Ohio*, 29 F.3d 238, 242-43 (6th Cir. 1994) (holding that plaintiff has the minimal burden of "showing a sufficient inferential connection" between the alleged violation and inmate violence to "justify a reasonable fear for personal safety.")

In this case, Plaintiff alleges that Defendant Contrares was responsible for labeling Plaintiff as a snitch, which placed him in danger of assault by other inmates. In addition, Plaintiff claims that Defendants Napel, Alexander, Huss, Niemisto, Schroderus, Robare, and Caron were aware of the threats against Plaintiff and failed to take any action to protect him. As a result, Plaintiff suffered attacks by inmates on at least two occasions. The court concludes that these claims are nonfrivolous and may not be dismissed on initial review.

Plaintiff also claims that he is mentally ill and that Defendants Robare and Unknown Parties ##7-10 failed to protect him from injuring himself. As noted above, Plaintiff claims that after he threatened to cut himself, he was placed in a suicide cell. Defendants Unknown Parties ##7-10 took his clothing, but failed to discover the razor he had concealed in his mouth. Plaintiff states that he was able to cut himself and that Defendants Unknown Parties ##7-10 did not see him do it despite

the fact that rounds were being made every fifteen minutes. Plaintiff's claim that this constitutes a failure to protect him in violation of the Eighth Amendment lacks merit. The fact that Plaintiff was able to outwit Defendants Unknown Parties ##7-10 by concealing the razor in his mouth and by cutting himself at a time when rounds were not being made does not show that Defendants Robare and Unknown Parties ##7-10 were deliberately indifferent. Therefore, this claim is properly dismissed.

Plaintiff also claims that Defendants Unknown Parties ##6-10 subjected him to excessive force when they broke up the fight between Plaintiff and inmate Pagan. Punishment may not be "barbarous" nor may it contravene society's "evolving standards of decency." *See Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981); *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Eighth Amendment also prohibits conditions of confinement which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain." *Rhodes*, 452 U.S. at 346. Among unnecessary and wanton infliction of pain are those that are "totally without penological justification." *Id.*

Plaintiff's claim must be analyzed under the Supreme Court authority limiting the use of force against prisoners. This analysis must be made in the context of the constant admonitions by the Supreme Court regarding the deference that courts must accord to prison or jail officials as they attempt to maintain order and discipline within dangerous institutional settings. *See, e.g.*, *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986).

Generally, restrictions and even harsh conditions of confinement are not necessarily cruel and unusual punishment prohibited by the Eighth Amendment. *Rhodes*, 452 U.S. 347. The Supreme Court has held that "whenever guards use force to keep order," the standards enunciated

in *Whitley*, 475 U.S. 312, should be applied. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *see also Wilkins v. Gaddy*, 130 S. Ct. 1175, 1178-79 (2010). Under *Whitley*, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 6-7; *Wilkins*, 130 S. Ct. at 1178. In determining whether the use of force is wanton and unnecessary, the court should evaluate the need for application of force, the relationship between that need and the amount of force used, the threat "reasonably perceived by the responsible officials," and any efforts made to temper the severity of the forceful response. *Hudson*, 503 U.S. at 6-7 (citing *Whitley*, 475 U.S. at 321); *accord Griffin v. Hardrick*, 604 F.3d 949, 953-54 (6th Cir. 2010); *McHenry v. Chadwick*, 896 F.2d 184 (6th Cir. 1990). Physical restraints are constitutionally permissible where there is penological justification for their use. *Rhodes*, 452 U.S. at 346; *Jones v. Toombs*, No. 95-1395, 1996 WL 67750, at *1 (6th Cir. Feb. 15, 1996); *Hayes v. Toombs*, No. 91-890, 1994 WL 28606, at * 1 (6th Cir. Feb. 1, 1994); *Rivers v. Pitcher*, No. 95-1167, 1995 WL 603313, at *2 (6th Cir. Oct. 12, 1995).

In his complaint, Plaintiff admits that he responded to the attack by inmate Pagan by punching Pagan two to three times. However, Plaintiff claims that he then stopped fighting. Plaintiff states:

> [Plaintiff] was then tazed in the back of the neck as Pagan was coming at him. [Plaintiff] tried to get up to defend as Pagan was about to kick him an unknown officer jumped over to tackle [Plaintiff] and Pagan, he kneed [Plaintiff] in the nose going over and hit his eye coming down. [Plaintiff] went down and reached the officers feet to prevent another kick, [Plaintiff] was tazed again in the back of the neck. While being tazed three officers pinned him twisted his thumbs and wrists putting his hands behind his back one officer Libbell elbowed [Plaintiff]'s eye and neck with his weight 300 or more [pounds]. All at the same time Officer Hemmila used an entire can of pepper spray on [Plaintiff]. This was maliciously done as

> [Plaintiff] was being tazed and three officers had restrained him. To spray him while being tazed and controlled by three staff was unnecessary. The use of tazers was unnecessary. The knee [and] elbows to [Plaintiff]'s face and neck was unnecessary.

See ECF No. 1, PageID.18.

Plaintiff attaches a copy of the class I misconduct hearing report as an exhibit to this complaint. In the reasons for findings, Hearing Officer Thomas O. Mohrman states:

> Fighting (014) 03.03.105A Physical confrontation between two or more persons, including a swing and miss, done in anger or with intent to injure. Pagan was the aggressor; he appeared to blind-side Cary. However, this prisoner did not leave when there was an avenue of escape. He could have either run in almost any direction to get away; he could have dropped to the ground as he indicated himself that the officers [were] in the yard shack. He used more force than necessary in repelling the other's initial attack. He responded with a volley of blows to the other and went on the offensive. His actions in response changed what could have been an assault / battery to a fight. By the time he was tazed the prisoner had already made the incident a fight. By responding when he could have left the area and then by using more force than necessary to the point he became an aggressor, this was not a case of self-defense but was a fight.

See ECF No. 1-2, PageID.30.

It is not clear from the record whether or not the force used by officers was necessary to gain control of the situation. Therefore, Plaintiff's excessive force claim against Defendants Unknown Parties ##1-6[1] is nonfrivolous and may not be dismissed on initial review.

[1]As noted above, Plaintiff claims that Officers Libbell and Hemmila were involved in this incident. It is unclear if they are two of the Unknown Officers named by Plaintiff in his complaint, or whether Unknown Parties ##1-6 are entirely different individuals.

III. Motion for Temporary Restraining Order and Preliminary Injunction

Plaintiff has also filed a motion for a temporary restraining order and preliminary injunction asserting that Defendant Robare has a "bad energy" and refuses to actually hear Plaintiff's issues and treat him. Plaintiff seeks to be treated by a different psychologist. *See* ECF No. 3. The Sixth Circuit has explained that a court confronted with a request for injunctive relief must consider and balance four factors:

> 1. Whether the movant has shown a strong or substantial likelihood or probability of success on the merits.
>
> 2. Whether the movant has shown irreparable injury.
>
> 3. Whether the preliminary injunction could harm third parties.
>
> 4. Whether the public interest would be served by issuing a preliminary injunction.

Mason County Medical Ass'n. v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). *See also*, *Frisch's Restaurant Inc. v. Shoney's*, 759 F.2d 1261, 1263 (6th Cir. 1985); *Ardister v. Mansour*, 627 F.Supp. 641, 643 (W.D. Mich. 1986).

Moreover, where a prison inmate seeks an order enjoining state prison officials, this court is required to proceed with the utmost care and must recognize the unique nature of the prison setting. *See Kendrick v. Bland*, 740 F.2d 432 at 438, n.3, (6th Cir. 1984). *See also Harris v. Wilters*, 596 F.2d 678 (5th Cir. 1979). It has also been remarked that a party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances. *See Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319 (2nd Cir. 1969), *cert. denied*, 394 U.S. 999 (1969). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1986).

A review of the materials of record fails to establish a substantial likelihood of success with respect to Plaintiff's claim that Defendant Robare's psychological treatment has caused him to injure himself in violation of his federal rights. Furthermore, Plaintiff has failed to establish that he will suffer irreparable harm absent injunctive relief. Because Plaintiff has failed to meet the heavy burden establishing the need for injunctive relief, Plaintiff's motion for a temporary restraining order and preliminary injunction are properly denied.

Moreover, a review of the docket sheet indicates that Plaintiff was transferred from MBP to the Carson City Correctional Facility on March 8, 2016. *See* ECF No. 11. Therefore he is no longer under the control or custody of Defendant Robare. The Sixth Circuit has held that transfer to another prison facility moots prisoner injunctive claims. *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir.1996); *Mowatt v. Brown*, No. 89-1955, 1990 WL 59896 (6th Cir. May 9, 1990); *Tate v. Brown*, No. 89-1944, 1990 WL 58403 (6th Cir. May 3, 1990); *Howard v. Heffron*, No. 89-1195, 1989 WL 107732 (6th Cir. September 20, 1989); *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991). These Sixth Circuit opinions contain only brief explanations of the reasoning supporting this rule. Underlying the rule is the premise that injunctive relief is appropriate only where plaintiff can show a reasonable expectation or demonstrated probability that he is in immediate danger of sustaining direct future injury as the *result* of the challenged official conduct. *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Past exposure to an isolated incident of illegal conduct does not, by itself, sufficiently prove that the plaintiff will be subjected to the illegal conduct again. *See, e.g., Lyons*, 461 U.S. at 102; *Alvarez v. City of Chicago*, 649 F. Supp. 43 (N.D. Ill. 1986); *Bruscino v. Carlson*, 654 F. Supp. 609, 614, 618 (S.D. Ill. 1987), *aff'd*, 854 F.2d 162 (7th Cir. 1988); *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974). A court should assume that, absent an official policy or practice

urging unconstitutional behavior, individual government officials will act constitutionally. *Lyon*, 461 U.S. at 102; *O'Shea*, 414 U.S. at 495-496.

In the present action, the possibility that Plaintiff will be subjected to the same alleged unconstitutional activity is too speculative to warrant injunctive relief. There has been no showing of a "reasonable expectation" nor a "demonstrated probability" that Plaintiff will be returned to MBP to be treated by Defendant Robare. Thus, there is no evidence of "immediate danger" of injury. Accordingly, Plaintiff's motion for a temporary restraining order and preliminary injunction will be denied.

IV. Motion for Appointment of Counsel

Plaintiff has requested a court appointed attorney. *See* ECF No. 5. Indigent parties in civil cases have no constitutional right to a court-appointed attorney. *Abdur-Rahman v. Mich. Dep't of Corr.*, 65 F.3d 489, 492 (6th Cir. 1995); *Lavado v. Keohane*, 992 F.2d 601, 604-05 (6th Cir. 1993). The Court may, however, request an attorney to serve as counsel, in the Court's discretion. *Abdur- Rahman*, 65 F.3d at 492; *Lavado*, 992 F.2d at 604-05; *see Mallard v. U.S. Dist. Court*, 490 U.S. 296 (1989).

Appointment of counsel is a privilege that is justified only in exceptional circumstances. In determining whether to exercise its discretion, the Court should consider the complexity of the issues, the procedural posture of the case, and Plaintiff's apparent ability to prosecute the action without the help of counsel. *See Lavado*, 992 F.2d at 606. The Court has carefully considered these factors and determines that, at this stage of the case, the assistance of counsel does not appear necessary to the proper presentation of Plaintiff's position. Plaintiff's request for appointment of counsel will be denied.

Conclusion

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Defendants Unknown Parties ##7-10 will be dismissed for failure to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c). The Court will serve the complaint against Defendants Napel, Alexander, Huss, Niemisto, Robare, Contrares, Schroderus, and Caron with regard to Plaintiff's Eighth Amendment claims that they failed to protect him from attacks by other inmates. The Court will also serve Plaintiff's complaint against Defendants Unknown Parties ##1-6 with regard to Plaintiff's excessive force claims.

An Order consistent with this Opinion will be entered.

Dated: 3/31/2016

/s/ *R. Allan Edgar*
R. Allan Edgar
United States District Judge