2017 WL 2125746
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United States District Court,
D. Connecticut.

Ja Qure AL-BUKHARI, Plaintiff,
v.
Scott SEMPLE, et al., Defendants

No. 3:16-cv-1428 (SRU)
|
Signed 05/16/2017

Attorneys and Law Firms

Ja Qure Al-Bukhari, Somers, CT, pro se.

INITIAL REVIEW ORDER

Stefan R. Underhill, United States District Judge

***1** Ja Qure Al-Bukhari, incarcerated and *pro se*, has filed a complaint pursuant to 42 U.S.C. § 1983 against Commissioner Scott Semple, Warden Anne Cournoyer, Warden William Mulligan, Lieutenant Tuttle, Lieutenant Porylo, Lieutenant Guimond, Lieutenant Bradley, Correction Officer Wemmel, Correction Officer Schmidt, Correction Officer McCarthy, Correction Officer Bogan, Correction Officer John Doe 1, Correction Officer John Doe 2, Correction Officer John Doe 3, Nurse Nancy Hill, and Nurse Kristen Carabine, all of whom are employees of the Connecticut Department of Correction. Al-Bukhari is suing all sixteen defendants in their individual and official capacities for acting with deliberate indifference to his medical needs, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Al-Bukhari is also suing defendants Porylo, Doe 1, Doe 2, and Doe 3 in their individual and official capacities for excessive force under the Eighth and Fourteenth Amendments, denial of due process under the Fifth and Fourteenth Amendments, and common law assault. Al-Bukhari seeks declaratory, injunctive, and monetary relief against all defendants for the alleged violations. For the reasons set forth below, the complaint will be dismissed in part.

I. Factual Allegations

Al-Bukhari's complaint alleges the following facts:

Al-Bukhari was at all relevant times incarcerated at Northern Correctional Institution in Somers, Connecticut. The Department of Correction ("DOC") has classified Al-Bukhari as a seriously mentally ill inmate, who has been diagnosed with several mental disorders, including bipolar disorder, post-traumatic stress disorder, attention deficit hyperactivity disorder, and antisocial personality disorder. Al-Bukhari suffers from suicidal ideations and has been taking medication to treat his ailments since childhood. He often engages in acts of self-harm.

On March 9, 2016, Al-Bukhari covered his cell window in violation of DOC policy, which prompted a correction officer to notify the lieutenant's office. By the time Lieutenants Porylo and Guimond and other correctional staff responded to the call and arrived at Al-Bukhari's cell, Al-Bukhari had removed the covering from the window. Nevertheless, the lieutenants ordered one correctional officer to activate a handheld camcorder and other officers to handcuff Al-Bukhari, but Al-Bukhari refused. Lieutenant Porylo also ordered Al-Bukhari, who was naked at the time, to clothe himself, but Al-Bukhari refused to do so. His refusal prompted Porylo to spray a chemical agent on his genital area and buttocks until he submitted to being handcuffed. Porylo and Correction Officers Doe 1, Doe 2, and Doe 3 then entered his cell, subdued him and restrained him in handcuffs.

After restraining Al-Bukhari, the officers attempted to clothe him with underwear but placed the underwear on him improperly. When the officers escorted Al-Bukhari out of his cell, the combination of the improper placement of his underwear and a wet floor caused Al-Bukhari to lose his balance and start to fall. As he tried to regain his balance, Doe 1, Doe 2, and Doe 3 "slammed" Al-Bukhari on the ground and Porylo again sprayed chemicals on his back, arms, and the back of his head. Other inmates housed in the area witnessed the event and ridiculed Al-Bukhari, whose genitalia was exposed due to the improper placement of his underwear.

***2** While on the ground and subdued, Doe 1, Doe 2, and Doe 3 attempted to turn Al-Bukhari's head so that Porylo could spray him in the face, but were unsuccessful. The officers repeatedly yelled at Al-Bukhari to "stop resisting!" even though Al-Bukhari was not doing so.

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After the struggle, the officers picked up Al-Bukhari from the ground and escorted him to the medical screening room. There, Al-Bukhari requested a shower to wash off the chemical agent with which Porylo had sprayed him, but Porylo and Nurse Carabine denied his request, which caused him to suffer from intermittent burning of his back, arms, genitals and buttocks.

At some point, Al-Bukhari "threatened to self-harm by banging his head on hard surfaces." This prompted Porylo to order the placement of Al-Bukhari in "four-point restraints" for several hours, during which Al-Bukhari continued to suffer from intense burning from the chemical agent. Afterward, Porylo and the officers returned Al-Bukhari to his cell, removed the "four-point restraints," and placed "in-cell restraints" on him. Al-Bukhari was denied soap, water and toilet paper to clean himself.

The next day, while still restrained in his cell, Al-Bukhari defecated on himself. He reported what he had done to Correction Officers Wemmel, Schmidt, McCarthy and Bogan and requested medical services and the opportunity to clean himself, but the officers denied his requests. Despite multiple tours of Al-Bukhari's cell, Wemmel, Schmidt, McCarthy and Bogan never reported that Al-Bukhari had defecated on himself. Unable to obtain assistance, Al-Bukhari covered his cell window, which was stained with feces. This prompted Officer Bogan to notify Lieutenant Tuttle, who came to Al-Bukhari's cell. Al-Bukhari notified Tuttle of his problem and again requested medical services, but Tuttle denied his request and told Al-Bukhari to "cut the shit out." In addition to denying his medical request, Tuttle, Wemmel, Schmidt, McCarthy, and Bogan "taunted and mocked" Al-Bukhari for defecating on himself. Eventually, a mental health social worker came to Al-Bukhari's cell for unrelated reasons, learned of his situation, and assured him that he would notify the lieutenant's office.

A short time later, Lieutenants Bradley and Guimond came to Al-Bukhari's cell to address the situation. Initially, Bradley denied Al-Bukhari's request for a shower and medical services, and Al-Bukhari began banging his head on the cell door. Officers again brought Al-Bukhari to the medical unit and permitted him to take a shower but denied him adequate soap to wash off the chemical agent, which was still causing him pain.

Al-Bukhari was physically restrained for a total of thirty-six hours. During that time, he complained to Nurses Hill and Carabine that the restraints were causing him muscle spasms and pain in his neck, back and shoulders due to his degenerative joint disease, but Hill and Carabine informed him that "there [ ] [was] nothing they [could] do because [Al-Bukhari] was in custody restraints."

II. Relevant Legal Principles

Under section 1915A of Title 28 of the United States Code, I must review prisoner civil complaints and dismiss any portion of the complaint that is frivolous or malicious, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Although detailed allegations are not required, the complaint must include sufficient facts to afford the defendants fair notice of the claims and the grounds upon which they are based and to demonstrate a right to relief. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555-56 (2007). Conclusory allegations are not sufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Nevertheless, it is well-established that "[*p*]*ro se* complaints 'must be construed liberally and interpreted to raise the strongest arguments that they suggest.' " *Sykes v. Bank of Am.*, 723 F.3d 399, 403 (2d Cir. 2013) (quoting *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006)); *see also Tracy v. Freshwater*, 623 F.3d 90, 101-02 (2d Cir. 2010) (discussing special rules of solicitude for *pro se* litigants).

III. Analysis

A. Claims Against Defendants in their Official Capacities for Monetary Damages

***3** To the extent Al-Bukhari is suing all sixteen defendants in their official capacities for monetary damages, such claims are barred by the Eleventh Amendment. *See Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985) (Eleventh Amendment protects state officials sued for damages in their official capacities); *Quern v. Jordan*, 440 U.S. 332, 342 (1979) (Congress did not intend for section 1983 claims to override state's Eleventh Amendment immunity). All claims for monetary damages against the defendants in their official capacities are, therefore, dismissed.

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B. Eighth Amendment Claims

A prison official's deliberate indifference to a prisoner's medical needs violates the Eighth Amendment's protection against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To state a claim for deliberate indifference to a serious medical need, the plaintiff must show both that his medical need was serious and that the defendants acted with a sufficiently culpable state of mind. *See Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir. 2003) (citing *Estelle*, 429 U.S. at 105). There are objective and subjective components to the deliberate indifference standard. *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994). Objectively, the alleged deprivation must be "sufficiently serious," meaning that it must be "one that may produce death, degeneration, or extreme pain." *Hathaway v. Coughlin*¸ 99 F.3d 550, 553 (2d Cir. 1996) (internal quotation marks omitted). Subjectively, the defendants must have been actually aware of a substantial risk that the inmate would suffer serious harm as a result of his actions or inactions. *Id.*; *Salahuddin v. Goord*, 467 F.3d 263, 280-81 (2d Cir. 2006). A claim that a prison official acted negligently with respect to the prisoner's medical needs does not rise to the level of deliberate indifference and is not cognizable under section 1983. *Hathaway v. Coughlin*, 99 F.3d at 553; *Salahuddin v. Goord*, 467 F.3d at 280.

Al-Bukhari alleges that all sixteen defendants violated his Eighth Amendment right against cruel and unusual punishment by acting with deliberate indifference to his medical needs in various ways. I will address each Eighth Amendment claim in turn.

1. Deliberate Indifference Claim Against Commissioner Semple, Warden Cournoyer, and Warden Mulligan

Al-Bukhari alleges that Commissioner Semple, Warden Cournoyer, and Warden Mulligan knew about his medical and mental health needs because they "were provided with [his] medical and psychological records" and, nevertheless, "permitted subordinates to obtain and use high[ly] concentrated chemical agents generally against inmates knowing that [they] cause[ ] unnecessary burning." He also alleges that these three defendants "knew that seriously ill inmates such as [Al-Bukhari] should not be placed in in-cell restraints absent professional judgment and subject to medical supervision" and permitted subordinates to place him in such restraints for unnecessarily long periods of time, thereby exacerbating his degenerative joint disease and causing him constant pain. Al-Bukhari claims that the culmination of these actions amounted to deliberate indifference to medical needs, in violation of the Eighth Amendment to the United States Constitution.

"It is well settled ... that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (internal quotation marks omitted); *see also Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir. 1973) (doctrine of *respondeat superior* does not suffice for claim of monetary damages under § 1983). A plaintiff who sues a supervisory official for monetary damages must allege that the official was "personally involved" in the constitutional deprivation in one of four ways: (1) the official directly participated in the deprivation; (2) the official learned about the deprivation through a report or appeal and failed to remedy the wrong; (3) the official created or perpetuated a policy or custom under which unconstitutional practices occurred; (4) the official was grossly negligent in managing subordinates who caused the unlawful condition or event; or (5) the official failed to act on information indicating that unconstitutional acts were occurring. *Wright*, 21 F.3d at 501; *Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir. 2003).

***4** Construing his complaint liberally, Al-Bukhari has stated a plausible Eighth Amendment claim against Commissioner Semple, Warden Cournoyer, and Warden Mulligan in their official capacities. Al-Bukhari does not allege that these three defendants participated in or failed to remedy the wrongful acts on March 9 and 10, 2016. He also does not allege that they were grossly negligent in managing their subordinate officers or failed to act on information that their subordinate officers were engaging in unconstitutional behavior. Al-Bukhari does allege, however, that these defendants perpetuated an unconstitutional policy of using harmful chemical agents against inmates and placing inmates with medical problems in "in-cell" restraints for unnecessarily long periods of time and he requests a change in such policy as a form of injunctive relief. For that reason, Al-Bukhari's allegations sufficiently state an Eighth Amendment claim

against Commissioner Semple, Warden Cournoyer, and Warden Mulligan in their official capacities. However, because none of these three defendants were allegedly involved in or knew about the specific incidents about which Al-Bakhari is complaining, the claims against them in their individual capacities are dismissed.

2. Deliberate Indifference Claim Against Remaining Defendants

Al-Bukhari sufficiently alleges that the remaining defendants were personally involved in the events of March 9 and 10, 2016, which gave rise to Eighth Amendment violations. He alleges that he informed the correctional officers and nurses that he was suffering from extreme pain as a result of being sprayed with a chemical agent and the staff repeatedly denied his requests for an adequate shower to clean himself and decontaminate the agent. He also alleges that the staff denied his request to clean himself after he had defecated on himself in his cell. I conclude that Al-Bukhari has alleged sufficient personal involvement of the correctional officers and nurses in the events of March 9 and 10, 2016, and has stated a plausible claim of deliberate indifference to medical needs against those defendants in their individual [and official] capacities. Thus, Al-Bukhari's deliberate indifference claim may proceed against defendants Tuttle, Porylo, Guimond, Bradley, Wemmel, Schmidt, McCarthy, Bogan, Hill, Carabine, and Does 1-3 [1] in their individual capacities.

3. Excessive Force Claim Against Lieutenant Porylo, Officer Doe 1, Officer Doe 2, and Officer Doe 3

Al-Bukhari alleges that Lieutenant Porylo and Correction Officers Doe 1, Doe 2, and Doe 3 violated his Eighth Amendment protection against cruel and unusual punishment by using excessive physical force against him in their efforts to remove him from his cell. His allegation constitutes a plausible Eighth Amendment claim.

"The use of excessive force against a prisoner may constitute cruel and unusual punishment in violation of Eighth Amendment." *Moore v. Murray*, 2017 WL 396139, at *3 (D. Conn. Jan. 27, 2017) (citing *Wilkins v. Gaddy*, 559 U.S. 34 (2010)). The inquiry into determining whether an excessive force claim exists "is not whether a certain quantum of injury was sustained but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* (internal quotation marks omitted).

Here, Al-Bukhari alleges that, after placing him in handcuffs and while removing him from his cell, Lieutenant Porylo and the three unnamed correction officers "slammed" Al-Bukhari on the ground and sprayed him with a harmful chemical agent, even though Al-Bukhari had not been resisting their efforts to escort him out of the cell. Al-Bukhari has stated a plausible excessive force claim against these four defendants in their individual capacities for monetary damages.

C. Fifth Amendment Claim

Al-Bukhari alleges that Lieutenant Porylo and the three unnamed correction officers also violated his Fifth Amendment right to due process by subjecting him to "unreasonable bodily restraints." The Fifth Amendment applies to the federal government, not to the states. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (Fifth Amendment due process applies to federal government actors whereas Fourteenth Amendment due process applies to state actors); *Ambrose v. City of New York*, 623 F. Supp. 2d 454, 466-67 (S.D.N.Y. 2009) (due process claim against city properly brought under Fourteenth Amendment, not Fifth Amendment). Al-Bukhari has not raised a claim against any federal government representative. Thus, his Fifth Amendment claims must be dismissed.

D. Fourteenth Amendment Claims

***5** Al-Bukhari has raised substantive due process claims under the Fourteenth Amendment in conjunction with his Eighth Amendment claims for deliberate indifference to medical needs and excessive force. Because Al-Bukhari's claims are covered by the Eighth Amendment protection against cruel and unusual punishment, his substantive due process claims under the Fourteenth Amendment are duplicative and, therefore, subject to dismissal. *See Graham v. Connor*, 490 U.S. 386, 395 (1989) (generalized notion of substantive due process under Fourteenth Amendment not applicable where other amendment provides explicit

textual source of constitutional protection against alleged government conduct). Therefore, Al-Bukhari's Fourteenth Amendment claims are dismissed.

E. State Law Claim

In addition to his excessive force claim, Al-Bukhari also alleges that Lieutenant Porylo and Correction Officers Doe 1, Doe 2, and Doe 3 committed common law assault against him "by subjecting [him] to arbitrary bodily restraints," causing him mental and physical harm. Pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), the district court can exercise supplemental jurisdiction over a state law claim if:

> (1) there is a claim arising under the federal constitution or federal laws; (2) the relationship between the federal claim and the state claim permits the conclusion that the entire action comprises but one constitutional case; (3) the federal claim has substance sufficient to confer subject matter jurisdiction on the court; and (4) the state and federal claims derive from a common nucleus of operative fact.

Miller v. Lovett, 879 F.2d 1066, 1071 (2d Cir. 1989), *abrogated on other grounds*, *Graham*, 490 U.S. at 386. I can exercise supplemental jurisdiction over Al-Bakhari's state-law assault claim because it arises out of the same set of facts as his Eighth Amendment claims of deliberate indifference to medical needs and excessive force against the same defendants. *See id.* at 1073 (court should exercise supplemental jurisdiction over state common law assault claim when federal constitutional claim of excessive force and assault claim are so tightly interwoven that decision on former will collaterally estop litigation of latter). At this stage of the proceeding, it appears that Al-Bukhari's Eighth Amendment claims and assault claim are sufficiently related in fact and, therefore, I will permit the common law assault claim to proceed against Lieutenant Porylo and the three unnamed correction officers in their individual capacities.

F. Declaratory Relief

As a remedy for his constitutional claims, Al-Bukhari seeks "[a] declaratory judgment that the actions of [the] [d]efendants violated the ... Eighth ... Amendment[ ] to the United States Constitution as well [as] the state law." Declaratory relief serves to "settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of that right or a disturbance of the relationship." *Colabella v. American Institute of Certified Public Accountants*, 2011 WL 4532132, at *22 (E.D.N.Y. Sept. 28, 2011) (citations omitted). Declaratory relief operates prospectively to enable parties to adjudicate claims before either side suffers great damages. *See In re Combustible Equip. Assoc.*, 838 F.2d 35, 37 (2d Cir. 1988). Al-Bukhari's complaint contains a request for injunctive relief, which he will be permitted to pursue against Commissioner Semple, Warden Cournoyer, and Warden Mulligan, in their official capacities. He has not identified any other prospective legal relationships or issues that require resolution via declaratory relief. Thus, his request for declaratory relief based on past conduct is dismissed pursuant to 28 U.S.C. § 1915A(b)(1). *See Camofi Master LDC v. College P'ship, Inc.*, 452 F. Supp. 2d 462, 480 (S.D.N.Y. 2006) (concluding that claim for declaratory relief that is duplicative of adjudicative claim underlying action serves no purpose).

IV. Conclusion

***6** It is hereby ordered that:

(1) The claims for monetary damages against all defendants in their official capacities are **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(2). The Fifth and Fourteenth Amendment claims are **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(1). The Eighth Amendment claim shall proceed against Commissioner Semple, Warden Cournoyer, and Warden Mulligan only in their official capacities for injunctive relief. The Eighth Amendment claim for deliberate indifference to medical needs shall proceed against each remaining defendant in their individual capacities for monetary relief. The Eighth Amendment claim for excessive force shall proceed against Lieutenant Porylo and Correction Officers John Doe 1, John Doe 2, and John Doe 3 (if their names are discovered) in their individual capacities for monetary relief. The common law assault claim shall proceed against

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Lieutenant Porylo and Correction Officers John Doe 1, John Doe 2, and John Doe 3 (if their names are discovered) in their individual capacities for monetary relief. Al-Bukhari's request for declaratory relief is **DISMISSED**.

(2) Within twenty-one (21) days of this Order, the U.S. Marshals Service shall serve the summons, a copy of the complaint and this order on defendants Semple, Cournoyer, and Mulligan in their official capacities by delivering one copy of the necessary documents in person to the Office of the Attorney General, 55 Elm Street, Hartford, CT 06141.

(3) The Clerk shall verify the current work addresses for defendants Tuttle, Porylo, Guimond, Bradley, Wemmel, Schmidt, McCarthy, Bogan, Hill, and Carabine with the Department of Correction Office of Legal Affairs, mail a waiver of service of process request packet containing the complaint to each defendant at the confirmed address within **twenty-one (21) days** of this Order, and report to the court on the status of the waiver request on the **thirty-fifth (35) day after mailing**. If any defendant fails to return the waiver request, the Clerk shall make arrangements for in-person service by the U.S. Marshals Service on him or her, and the defendant shall be required to pay the costs of such service in accordance with Fed. R. Civ. P. 4(d).

(4) Because Al-Bukhari has not identified Correctional Officers John Doe 1, John Doe 2, and John Doe 3 by name, the Clerk is not able to serve a copy of the complaint on those defendants in their individual capacities. Al-Bukhari must, **within ninety (90) days of the date of this order**, conduct discovery and file a notice indicating the first and last name of those three defendants. If Al-Bukhari files the notice, the Court will direct the Clerk to effect service of the complaint on those defendants in their individual capacities. If Al-Bukhari fails to identify those defendants within the time specified, the claims against them will be dismissed pursuant to Fed. R. Civ. P. 4(m).

(5) Defendants Semple, Cournoyer, Mulligan, Tuttle, Porylo, Guimond, Bradley, Wemmel, Schmidt, McCarthy, Bogan, Hill, and Carabine shall file their response to the complaint, either an answer or motion to dismiss, **within sixty (60) days from the date the notice of lawsuit and waiver of service of summons forms are mailed to them**. If they choose to file an answer, they shall admit or deny the allegations and respond to the cognizable claims recited above. They may also include any and all additional defenses permitted by the Federal Rules.

***7** **(6)** Discovery, pursuant to Fed. R. Civ. P. 26-37, shall be completed **within six months (180 days) from the date of this order**. Discovery requests should not be filed with the court.

(7) All motions for summary judgment shall be filed **within seven months (210 days) from the date of this order**.

SO ORDERED at Bridgeport, Connecticut this 16th day of May 2017.

All Citations

Slip Copy, 2017 WL 2125746

Footnotes

1 Al-Bukhari's claims against the three unnamed correction officers (John Doe 1, John Doe 2, and John Doe 3) will only proceed if he complies with this Court's order of ascertaining their first and last names in discovery. *See* Order # 4, *infra* at 13.

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2008 WL 3833227
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United States District Court,
S.D. New York.

Jamel BROWN, Plaintiff,
v.
C.O. J. BANKS, et al., Defendant.

No. 06 Civ. 14304(LTS)(HBP).
|
Aug. 14, 2008.

OPINION AND ORDER

PITMAN, United States Magistrate Judge.

***1** By motion dated January 10, 2008, (Docket Item 27), plaintiff, who is incarcerated, moves for *pro bono* counsel. [1] For the reasons set forth below, the motion is denied without prejudice to renewal.

The factors to be considered in ruling on a motion for *pro bono* counsel are well settled and include "the merits of plaintiff's case, the plaintiff's ability to pay for private counsel, [plaintiff's] efforts to obtain a lawyer, the availability of counsel, and the plaintiff's ability to gather the facts and deal with the issues if unassisted by counsel." *Cooper v. A. Sargenti Co.,* 877 F.2d 170, 172 (2d Cir.1986). Of these, "[t]he factor which command[s] the most attention [is] the merits." *Id. Accord Odom v. Sielaff,* 90 Civ. 7659(DAB), 1996 WL 208203 at *1 (S.D.N.Y. Apr. 26, 1996). As noted by the Court of Appeals:

> Courts do not perform a useful service if they appoint a volunteer lawyer to a case which a private lawyer would not take if it were brought to his or her attention. Nor do courts perform a socially justified function when they request the services of a volunteer lawyer for a meritless case that no lawyer would take were the plaintiff not indigent.

Cooper v. A. Sargenti Co., supra, 877 F.2d at 174. *See also Hendricks v. Coughlin,* 114 F.3d 390, 392 (2d Cir.1997) ("In deciding whether to appoint counsel ... the district judge should first determine whether the indigent's position seems likely to be of substance.") (internal quotation marks omitted).

Although I am willing to assume plaintiff's financial inability to retain counsel and that by contacting one law firm he has made sufficient efforts on his own to secure counsel, his current application establishes none of the other elements relevant to an application for counsel.

In response to the question on the form motion for counsel that asks plaintiff to explain why he feels he needs a lawyer, plaintiff stated, "To reassure professional guidance." The need for guidance is not sufficient. If the need for guidance were sufficient to warrant adding a case to the list circulated to the *Pro Bono* Panel, nearly every *pro se* case would be added to that list.

Although it is, of course, impossible to assess fully the merits of the case at this stage, it also appears from the face of the complaint that plaintiff will probably face substantial difficulty in succeeding in this case. Plaintiff alleges that, after he disobeyed an order to remove his jacket, the defendants sprayed him with mace, kicked and punched him, threw him to the floor, and handcuffed him. Plaintiff claims to have suffered numbness in his hand and a swollen ankle. It appears the plaintiff will confront several difficulties in litigating his case because: (1) prison guards are given some leeway in using force, especially when a prisoner disobeys an order, (2) the use of mace is not necessarily excessive force, (3) the occurrence of minor injuries because of tight handcuffs does not necessarily imply excessive force was used, and (4) there are no uninterested witnesses to the incident.

***2** Even though the Supreme Court has held that a significant injury is not necessary for an Eighth Amendment claim, *Hudson v. McMillian,* 503 U.S. 1, 9 (1992), "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.1973) *overruled on other grounds, Graham v. Connor,* 490 U.S. 386, 397 (1989).

> To establish a constitutional violation under the Eighth Amendment, an inmate must meet both an objective and a subjective requirement. To meet the objective requirement, the alleged violation must be "sufficiently serious" by objective standards. *See Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L . Ed.2d

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811 (1994) (quoting *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). The objective component is "context specific, turning upon 'contemporary standards of decency.' " *Blyden,* 186 F.3d at 263 (quoting *Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (quoting *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 50 L . Ed.2d 251 (1976))). To meet the subjective requirement, the inmate must show that the prison officials involved "had a 'wanton' state of mind when they were engaging in the alleged misconduct." *Davidson v. Flynn,* 32 F.3d 27, 30 (2d Cir.1994).

Griffen v. Crippen, 193 F.3d 89, 91 (2d Cir.1999); *see also Romano v. Howarth,* 998 F.2d 101, 105 (2d Cir.1993). Therefore, the merits of plaintiff's case here are not strong because "[t]he infliction of pain in the course of a prison security measure ... does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied ... was unreasonable ...." *Whitley v.. Albers,* 475 U.S. 312, 319 (1986).

Furthermore, there is authority holding that the use of mace is not a sufficient basis for an excessive force claim in the absence of "injuries from being sprayed with mace-aside from the immediate discomfort." *McLaurin v. New Rochelle Police Officers,* 373 F.Supp.2d 385, 394 (S.D.N.Y.2005); *see also Cunningham v. New York City,* 04 Civ. 10232(LBS), 2007 WL 2743580, at *7 (S.D.N.Y. Sept. 18, 2007) (finding mace to be *de minimus* use of force when the plaintiff suffered expected side-effects).

Similarly, there is authority that the use of tightly fastened handcuffs that result in either no injury or only minor injuries is not an actionable use of excessive force. *See Drummond v. Castro,* 522 F.Supp.2d 667, 679 (S.D.N.Y.2007) (finding that the use of tight handcuffs was not excessive force); *Hamlett v. Town of Greenburgh,* 05 Civ. 3215(MDF), 2007 WL 119291 at *3 (S.D.N.Y. Jan. 17, 2007) (finding that numbness resulting from handcuffs was not sufficient to constitute excessive force).

Finally, there were no uninterested witnesses present at the time of the incident. According to the complaint, only the officials allegedly involved in the incident were present at the scene of the altercation.

***3** Accordingly, because plaintiff has failed to show that his petition is sufficiently meritorious, his motion for counsel is denied without prejudice to renewal. Any renewed motion should be accompanied by an affidavit establishing the factors identified above.

SO ORDERED

All Citations

Not Reported in F.Supp.2d, 2008 WL 3833227

Footnotes

1 In a civil case, such as this, the Court cannot actually "appoint" counsel for a litigant. Rather, in appropriate cases, the Court submits the case to a panel of volunteer attorneys. The members of the panel consider the case, and each decides whether he or she will volunteer to represent the plaintiff. If no panel member agrees to represent the plaintiff, there is nothing more the Court can do. *See generally Mallard v. United States District Court,* 490 U.S. 296 (1989). Thus, even in cases where the Court finds it is appropriate to request volunteer counsel, there is no guarantee that counsel will actually volunteer to represent plaintiff.

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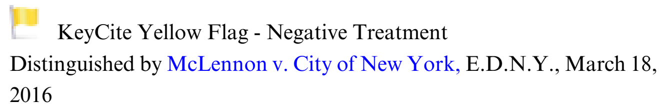
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624 Fed.Appx. 10
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RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

Frank B. IACOVANGELO, Public Administrator, Monroe County, as Administrator of the Estate of Maria Viera, Plaintiff–Appellant,
v.
CORRECTIONAL MEDICAL CARE, INC., Emre Umar, Registered Nurse Tamara Augello, Registered Nurse Maryanne McQueeney, Maria Biuso, whose job title cannot presently be determined but who served as the senior policy maker for Correctional Medical Care at the Monroe County Jail, Defendants–Appellees, The County of Monroe, Patrick O'flynn, Ron Harling, Deputy Denise Cesarano, Deputy Peter Decoste, Deputy Caroline McClellan, Deputy Bobbie Jo Bishop, Defendants. [1]

No. 14–4157–cv.
|
Sept. 14, 2015.

Synopsis
Background: Administrator of county jail detainee's estate filed suit under § 1983 against county, contractor that provided health care services to jail, registered nurses, and others, asserting claims for deliberate indifference to detainee's serious medical needs. The United States District Court for the Western District of New York, Siragusa, J., dismissed complaint for failure to state claim, 2014 WL 4955366, and then denied reconsideration, 2015 WL 277590. Administrator appealed.

Holdings: The Court of Appeals held that:

[1] administrator adequately alleged that detainee was suffering objectively serious medical condition during detention, as required to state claim against jail's registered nurses for deliberate indifference to detainee's medical needs;

[2] administrator adequately alleged that nurse knew of and disregarded excessive risk to health or safety of detainee who suffered from drug withdrawal following her admission to jail;

[3] administrator did not adequately plead claim of deliberate indifference by second nurse; and

[4] administrator did not adequately plead claim against county and contractor for supervisory liability.

Affirmed in part; vacated in part; remanded.

***11** Appeal from the United States District Court for the Western District of New York (Siragusa, J.).

***12 ON CONSIDERATION WHEREOF,** it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the judgment of the district court is **AFFIRMED** in part, **VACATED** in part, and **REMANDED.**

Attorneys and Law Firms

Elmer Robert Keach, III, Albany, NY, for Plaintiff–Appellant.

Paul A. Sanders, Hiscock & Barclay, LLP, Rochester, NY; Monroe County Law Department, Rochester, NY, for Defendants–Appellees.

Present: ROBERT A. KATZMANN, Chief Judge, PETER W. HALL and RAYMOND J. LOHIER, JR., Circuit Judges.

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SUMMARY ORDER

Plaintiff–Appellant appeals from a final judgment entered on January 22, 2015, by the United States District Court for the Western District of New York (Siragusa, *J.*), which dismissed the plaintiff's amended complaint and denied his motion for reconsideration. The factual gravamen of the plaintiff's amended complaint concerned Maria Viera's death on September 2, 2010, from myocarditis, allegedly as a result of heroin withdrawal, in the Monroe County Jail in Rochester, New York. On appeal, the plaintiff argues that the district court failed to follow the appropriate standard of review by consistently construing facts from the amended complaint in favor of the defendants rather than the plaintiff. Specifically, the plaintiff contends (1) that the amended complaint properly pleaded a claim for indifference to the medical needs of a pre-trial detainee under 42 U.S.C. § 1983; (2) that the amended complaint properly pleaded a *Monell* claim under 42 U.S.C. § 1983; and (3) that the district court abused its discretion by denying the plaintiff's post-judgment motion for reconsideration. We assume the parties' familiarity with the underlying facts, procedural history, and issues presented for review.

We review de novo a district court's decision dismissing a complaint under Rule 12(b)(6), and must accept as true the facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor. *See Rothstein v. UBS AG,* 708 F.3d 82, 90 (2d Cir.2013). We review for abuse of discretion a district court's decision to deny a post-judgment motion for leave to replead. *See Williams v. Citigroup, Inc.,* 659 F.3d 208, 212 (2d Cir.2011) (per curiam).

[1] First, the plaintiff contends that the amended complaint properly pleaded a claim for indifference to the medical needs of a pre-trial detainee in state custody, in violation of her constitutional rights and actionable under 42 U.S.C. § 1983. A claim for indifference to the medical needs of a pre-trial detainee in state custody is properly analyzed under the Due Process Clause of the Fourteenth Amendment, though such claims "should be analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth Amendment." *Caiozzo v. Koreman,* 581 F.3d 63, 72 (2d Cir.2009). An inmate must allege (1) an objectively "serious medical condition"; and (2) subjective "deliberate indifference" on the part of the defendant official. *Id.; see also Walker v. Schult,* 717 F.3d 119, 125 (2d Cir.2013) (holding that to state an Eighth Amendment claim, "an inmate must allege that: (1) objectively, the deprivation the inmate suffered was sufficiently serious" and "(2) subjectively, the defendant official acted with a sufficiently culpable state of mind." (internal quotation marks omitted)). The plaintiff contends that the district court erred in finding that the amended complaint failed to satisfy both objective and subjective prongs.

***13** Although there is no *per se* rule that drug or alcohol withdrawal constitutes an objectively serious medical condition, courts in this Circuit have found many such instances to satisfy the objective prong. *See, e.g., Caiozzo,* 581 F.3d at 69 (finding, with respect to the objective prong, that "there is no dispute that Caiozzo had a serious medical condition" where he suffered from alcohol withdrawal); *Livermore v. City of New York,* No. 08–cv–4442, 2011 WL 182052, at *6 (S.D.N.Y. Jan. 13, 2011) ("[T]he Second Circuit often holds, frequently with little elaboration, that alcohol withdrawal satisfies the first element"). Here, the amended complaint pleaded that it was clear that Viera needed medically supervised drug detoxification because she acknowledged being under the influence of drugs, daily drug usage, and a history of drug abuse, at the time of her admission to Monroe County Jail, and that "a visual assessment" would have shown that "she was under the influence of drugs at the time of her admission." J.A. 46. Further, the amended complaint alleged that "Viera was observed vomiting in her toilet and otherwise being in distress." J.A. 47. Drawing all reasonable inferences in the plaintiff's favor, such allegations sufficiently plead an objectively serious medical condition.

[2] **[3]** With respect to the subjective prong, the question is whether the defendants "kn[ew] of and disregard[ed] an excessive risk to [Viera's] health or safety" or were both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and ... also dr[e]w the inference." *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *see also Johnson v. Wright,* 412 F.3d 398, 403 (2d Cir.2005). The plaintiff challenges the district court's determination that the subjective prong was not satisfied with respect to Nurse Augello and Nurse McQueeney. With respect to Augello, the amended complaint alleges

that, at booking, Viera was subjected by Augello to a medical screening, during which it was evident that Viera was suffering from withdrawal. Indeed, Viera's screening form noted that "Viera admitted to the daily use of drugs ..., that she had a history of drug and alcohol abuse, and that she acknowledged being under the influence of drugs at the time of her admission to jail." JA 45–46. Despite this, Augello failed to refer Viera to medically supervised withdrawal. With respect to McQueeney, the amended complaint alleges that "Viera was observed vomiting in her toilet and otherwise being in distress by ... McQueen[e]y." J.A. 47. But unlike Augello, the Amended Complaint does not plead that McQueeney had any knowledge of Viera's history of drug abuse, acknowledgment of being under the influence of drugs at the time of her admission to jail, or awareness that Viera was suffering from withdrawal. Thus, drawing all inferences in the plaintiff's favor, these allegations are sufficient to plead the subjective prong with respect to Augello, but not McQueeney.

[4] Second, the plaintiff argues on appeal that the amended complaint properly pleaded a *Monell* claim under 42 U.S.C. § 1983. To plead a *Monell* claim, a plaintiff must allege the existence of a formal policy which is officially endorsed by the municipality, or a practice so persistent and widespread that it constitutes a custom or usage of which supervisory authorities must have been aware, or that a municipal custom, policy, or usage can be inferred from evidence of deliberate indifference of supervisory officials to such abuses. *See, e.g., Jones v. Town of East Haven,* 691 F.3d 72, 80–81 (2d Cir.2012). None of the three methods of pleading a *Monell* claim have been met here. First, ***14** no formal policy to provide inadequate medically supervised withdrawal has been pleaded outside of entirely conclusory allegations. Second, "a sufficiently widespread practice among [Correctional Medical Care employees] to support reasonably the conclusion that [insufficient medically supervised withdrawal] was the custom ... and that supervisory personnel must have been aware of it" has not been shown. *Id.* at 82. Here, although Correctional Medical Care appears to have a troubled track record in many respects, the plaintiff has not pleaded a *custom* of not providing adequate medical supervision for inmates going through drug or alcohol withdrawal. Indeed, other than the plaintiff, the amended complaint provides only one additional example of a similar incident. Third, "a showing of deliberate indifference on the part of supervisory personnel" to inadequate medically supervised withdrawal has not been plausibly pleaded, as nothing in the complaint plausibly alleges knowledge of this matter on the part of any supervisory personnel. *Id.; see also id.* at 81 ("[t]o establish deliberate indifference a plaintiff must show that a policymaking official was aware of a constitutional injury").

Finally, the plaintiff contends that the district court abused its discretion by denying the plaintiff's post-judgment motion for reconsideration, filed on October 31, 2014, after the district court entered judgment dismissing the action on October 3, 2014. But because we vacate and remand the district court's underlying judgment, we need not reach the plaintiff's challenge to the district court's post-judgment motion for reconsideration.

We have considered all of the Plaintiff–Appellant's remaining arguments and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is **AFFIRMED** in part, **VACATED** in part, and **REMANDED.**

All Citations

624 Fed.Appx. 10

Footnotes

1 The Clerk of the Court is directed to amend the caption to conform with the above.

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2012 WL 398812
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Ernest MATTISON, Plaintiff,
v.
Joseph DECKER, Correctional Officer/Corporal, Ulster County Jail; Tyrone Brodhead, Correctional Officer, Ulster County Jail; John Legg, Correctional Officer, Ulster County Jail; and E.P. Cunningham, Correctional Officer, Ulster County Jail, Defendants.

Civil Action No. 9:10–CV–0504 (GLS/DEP).
|
Jan. 11, 2012.

Attorneys and Law Firms

Ernest Mattison, Stormville, NY, pro se.

Cook, Netter Law Firm, Eric M. Kurtz, Esq., Robert D. Cook, Esq., of Counsel, Kingston, NY, for Defendants.

REPORT AND RECOMMENDATION

DAVID E. PEEBLES, United States Magistrate Judge.

***1** *Pro se* plaintiff Ernest Mattison, a New York State prison inmate, has commenced this action pursuant to 42 U.S.C. § 1983 alleging deprivation of his civil rights. In his complaint, plaintiff maintains that while incarcerated in a local jail facility he was assaulted by the four named defendants. Plaintiff asserts that by their actions the defendants violated his rights under the Eighth Amendment.

Currently pending before the court is defendants' motion for summary judgment seeking dismissal of plaintiff's complaint. In their motion defendants argue that no reasonable factfinder could conclude that plaintiff's Eighth Amendment rights were violated in connection with the incident in question, despite his claims to the contrary. Having reviewed the record now before the court, considered in a light most favorable to the plaintiff, I find that the case will ultimately turn upon resolution of credibility issues, which are not appropriately determined on a summary judgment motion, and I therefore recommend that defendants' motion be denied.

I. *BACKGROUND*[1]

Plaintiff is currently a prison inmate entrusted to the care and custody of the New York State Department of Corrections and Community Supervision ("DOCCS") and designated to the Green Haven Correctional Facility, located in Stormville, New York. Complaint (Dkt. No. 1) § 2; *see also* Dkt. No. 32. At the times relevant to his complaint, however, plaintiff was an inmate at the Ulster County Jail ("Ulster"), located in Kingston, New York. Complaint (Dkt. No. 1) § 3.

Plaintiff's claims stem from an incident occurring on July 27, 2008 at Ulster while jail officials attempted to transfer Mattison from his C–Pod cell to H–Pod to serve a thirty-day sentence of keeplock confinement resulting from a disciplinary hearing. Complaint (Dkt. No. 1) § 6; Decker Aff. (Dkt. No. 38–1, Exh. D) ¶ 4; Brodhead Aff. (Dkt. No. 38–1, Exh. E) ¶ 4; Legg Aff. (Dkt. No. 38–1, Exh. F) ¶ 3. The parties generally agree that on that date each of the four named defendants, Corrections Corporal Joseph Decker and Corrections Officers Tyrone Brodhead, John Legg, and E.P. Cunningham, was involved in some way in events leading up to the transfer. *See id.* It is at this point that the parties' versions of the relevant events diverge.

Plaintiff asserts that on the date in question the four named defendants rushed into his cell and began punching him in the face, head, and body, and applied mace. Complaint (Dkt. No. 1) § 6. Plaintiff further contends that he was grabbed and placed in a choke hold by defendant Decker and flung to the concrete floor of his cell where defendant Cunningham "began to kick & stomp on [his] back and neck repeatedly." *Id.* Plaintiff alleges that once subdued he was handcuffed by defendant Legg, and that the handcuffs were applied in such a fashion as to cause his hands to swell and turn blue and purple and that, when asked, defendants Brodhead and Decker refused to loosen the cuffs. *Id.* Plaintiff asserts that defendant Legg then dragged him by the handcuffs while the officers continued to beat him, and that he was pushed into the shower where he was scalded with hot water, and more mace was applied to his face and eyes. *Id.* Plaintiff alleges that as a result of the incident he was left in a great deal of pain and was unable to move, and that he was ultimately required to seek medical attention for injuries to his hands, wrists,

neck and back, suffering permanent nerve damage in both his left and right hands. *Id.*

***2** The defendants' submissions to the court in support of their motion portray a vastly different version of the relevant events. According to the defendants, on the morning of July 27, 2008, defendant Cunningham, who at the time was acting as a pod officer for the Ulster County Sheriff's Department, received a call from his supervisor advising the plaintiff was to be transported to H–Pod where he was to serve a disciplinary period of confinement. Cunningham Aff. (Dkt. No. 38–1 Exh. C) ¶ 3. At approximately 9:25 a.m. on that day, defendants Legg and Brodhead had arrived at C–Pod for the purpose of transporting the plaintiff and requested that defendant Cunningham open plaintiff's cell door, which he did from his remote location at the entrance to the pod. [2] When defendants Legg and Brodhead entered plaintiff's cell and explained the purpose of their visit Mattison threw a cup of coffee toward the officers and dispersed the remainder of his belongings from his desk onto the floor. Brodhead Aff. (Dkt. No. 38–1, Exh. E) ¶ 4; Legg Aff. (Dkt. No. 38–1, Exh. F) ¶ 4. The plaintiff was verbally instructed to submit to the officers and permit himself to be handcuffed, but refused. *Id.* The officers then requested assistance from Corrections Corporal Decker. *Id.*

After Corporal Decker's arrival plaintiff continued to resist and, according to the defendants' version, attempted to bite both defendant Legg and defendant Decker. Brodhead Aff. (Dkt. No. 38–1, Exh. E) ¶ 5; Legg Aff. (Dkt. No. 38–1, Exh. F) ¶ 5; Decker Aff. (Dkt. No. 38–1, Exh. D) ¶ 5. After a warning was given, chemical spray was administered by defendant Legg in order to end the confrontation. Decker Aff. (Dkt. No. 38–1, Exh. D) ¶ 5; Legg Aff. (Dkt. No. 38–1, Exh. F) ¶ 5. Plaintiff was subsequently subdued and transported to H–Pod, where he arrived in his cell at 9:40 a.m. Decker Aff. (Dkt. No. 38–1, Exh. D) ¶ 6. Plaintiff was escorted to H–Pod by two corrections officers, Blum and Bogart, who are not named as defendants in the action; none of the four named defendants participated in the escort. Decker Aff. (Dkt. No. 38–1, Exh. D) ¶ 5. Legg Aff. (Dkt. No. 38–1, Exh. F) ¶¶ 6–7. The defendants categorically deny having choked, punched, or kicked the plaintiff and assert that it was his actions in refusing to submit and allow officers to handcuff him that resulted in the use of force and the deployment of chemical spray. Cunningham Aff. (Dkt. No. 38–1 Exh. C) ¶ 7; Decker Aff. (Dkt. No. 38–1, Exh. D) ¶ 7; Brodhead Aff. (Dkt. No. 38–1, Exh. E) ¶¶ 6–7; Legg Aff. (Dkt. No. 38–1, Exh. F) ¶ 7.

II. *PROCEDURAL HISTORY*

Plaintiff commenced this action with the filing of a complaint, accompanied by a request for leave to proceed *in forma pauperis* ("IFP"), on April 30, 2010. Dkt. Nos. 1, 2. Named as defendants in plaintiff's complaint are Corrections Corporal Joseph Decker as well as Corrections Officers Tyrone Brodhead, John Legg, and E.P. Cunningham. Plaintiff asserts an Eighth Amendment excessive force claim against each of the four defendants and requests an award of compensatory damages in the amount of $200,000. *Id.* Following a routine review of plaintiff's complaint, I issued an order dated May 18, 2010 granting plaintiff's IFP application and directing that the complaint be filed and summonses issued for service by the United States Marshals Service. Dkt. No. 5.

***3** On April 29, 2011, after the joinder of issue and completion of discovery, defendants moved for the entry of summary judgment dismissing plaintiff's claims against them. Dkt. No. 38. The filing of that motion was followed by submission of defendants' memorandum of law on May 9, 2011. Dkt. No. 40. The court received plaintiff's response to defendants' motion on June 20, 2011. Dkt. No. 42. Defendants' motion, which is now fully briefed and ripe for determination, has been referred to me for the issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c). *See* Fed. Rule Civ. P. 72(b).

III. *DISCUSSION*

A. *Summary Judgment Standard*

Summary judgment motions are governed by Rule 56 of the Federal Rules of Civil Procedure. Under that provision, summary judgment is warranted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 2509–10, 91 L.Ed.2d 202 (1986); *Security Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.,* 391 F.3d 77, 82–83 (2d Cir.2004). A fact is "material", for purposes of this

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inquiry, if it "might affect the outcome of the suit under the governing law." *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510; *see also Jeffreys v. City of New York,* 426 F.3d 549, 553 (2d Cir.2005) (citing *Anderson*). A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510.

A party moving for summary judgment bears an initial burden of demonstrating that there is no genuine dispute of material fact to be decided with respect to any essential element of the claim in issue; the failure to meet this burden warrants denial of the motion. *Anderson,* 477 U.S. at 250 n. 4, 106 S.Ct. at 2511 n. 4; *Security Ins.,* 391 F.3d at 83. In the event this initial burden is met the opposing party must show, through affidavits or otherwise, that there is a material issue of fact for trial. Fed.R.Civ.P. 56(e); *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553; *Anderson,* 477 U.S. at 250, 106 S.Ct. at 2511. Though *pro se* plaintiffs are entitled to special latitude when defending against summary judgment motions, they must establish more than mere "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *but see Vital v. Interfaith Med. Ctr.,* 168 F.3d 615, 620–21 (2d Cir.1999) (noting obligation of court to consider whether *pro se* plaintiff understood nature of summary judgment process).

***4** When deciding a summary judgment motion, a court must resolve any ambiguities, and draw all inferences from the facts, in a light most favorable to the nonmoving party. *Jeffreys,* 426 F.3d at 553; *Wright v. Coughlin,* 132 F.3d 133, 137–38 (2d Cir.1998). Summary judgment is warranted only in the event of a finding that no reasonable trier of fact could rule in favor of the non-moving party. *See Building Trades Employers' Educ. Ass'n v. McGowan,* 311 F.3d 501, 507–08 (2d Cir.2002) (citation omitted); *see also Anderson,* 477 U.S. at 250, 106 S.Ct. at 2511 (summary judgment is appropriate only when "there can be but one reasonable conclusion as to the verdict").

B. *Excessive Force/Failure to Intervene*

In their motion, defendants argue that no reasonable factfinder could conclude plaintiff's Eighth Amendment rights were violated by their conduct.[3] As a basis for this contention defendants assert that the record lacks evidence demonstrating defendants acted with subjective wantonness. Defendants also maintain that plaintiff's failure to identify any "lasting injury" provides further grounds for dismissal of her claim.

Plaintiff's contention that the four jail employees named in his complaint utilized excessive force against him implicates the Eighth Amendment's prohibition against cruel and unusual punishment. *Whitley,* 475 U.S. at 319–320, 106 S.Ct. 1084–85; *Griffin v. Crippen,* 193 F.3d 89, 91 (2d Cir.1999). That amendment proscribes punishments that involve the "unnecessary and wanton infliction of pain" and are incompatible with "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble,* 429 U.S. 97, 102, 104, 97 S.Ct. 285, 290, 291, 50 L.Ed.2d 251 (1976); *see also Whitley v. Albers,* 475 U.S. 312, 319, 106 S.Ct. 1076, 1084 (1986) (citing, *inter alia, Estelle*). While the Eighth Amendment does not mandate comfortable prisons, neither does it tolerate inhumane treatment of those in confinement; thus, the conditions of an inmate's confinement are subject to Eighth Amendment scrutiny. *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L.Ed.2d 811 (1994) (citing *Rhodes v. Chapman,* 452 U.S. 337, 349, 101 S.Ct. 2392, 2400, 69 L.Ed.2d 59 (1981)).

The lynchpin inquiry in deciding claims of excessive force against prison officials under the Eighth Amendment is "whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Hudson v. McMillian,* 503 U.S. 1, 6–7, 112 S.Ct. 995, 998–999, 117 L.Ed.2d 156 (1992) (applying *Whitley* to all excessive force claims); *Whitley,* 475 U.S. at 320–21, 106 S.Ct. at 1085 (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), *cert. denied sub nom., John v. Johnson,* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973)). Analysis of claims of cruel and unusual punishment requires both objective examination of the effect of the use of force and a subjective inquiry into the defendant's motive for his or her conduct. *Wright v. Goord,* 554 F.3d 255, 268 (2d Cir.2009) (citing *Hudson,* 503 U.S. at 7–8, 112 S.Ct. at 999 and *Blyden v. Mancusi,* 186 F.3d 252, 262 (2d Cir.1999)). As was emphasized by the United States Supreme Court in *Wilkins v. Gaddy,* however, after *Hudson* the "core judicial inquiry" is focused not upon the extent of the injury sustained, but instead whether the nature of the force applied was nontrivial. — U.S. ——, 130 S.Ct. 1175, 1178, 175 L.Ed.2d 995 (2010) (per curiam). Accordingly, when considering the subjective element of the governing

Eighth Amendment test a court must be mindful that the absence of serious injury, though relevant, does not necessarily negate a finding of wantonness since, as the Supreme Court has noted,

> ***5** [w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.... This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.

Hudson, 503 U.S. at 9, 112 S.Ct. at 1000 (citations omitted); *See Velasquez v. O'Keefe,* 899 F.Supp. 972, 973 (N.D.N.Y.1995) (McAvoy, C.J.) (quoting *Hudson,* 503 U.S. at 9, 112 S.Ct. at 1000); *see also Romaine v. Rewson,* 140 F.Supp.2d 204, 211 (N.D.N.Y.2001) (Kahn, J.). Even a de minimis use of physical force can constitute cruel and unusual punishment if it is "repugnant to the conscience of mankind." *Hudson,* 503 U.S. at 9–10, 112 S.Ct. 1000 (citations omitted).

With its focus on the harm done, the objective prong of the inquiry is contextual and relies upon "contemporary standards of decency." *Wright,* 554 F.3d at 268 (quoting *Hudson,* 503 U.S. at 8, 112 S.Ct. at 1000) (internal quotations omitted)). When addressing this component of an excessive force claim under the Eighth Amendment calculus, the court can consider the extent of the injury suffered by the inmate plaintiff. While the absence of significant injury is certainly relevant, it is not dispositive. *Hudson,* 503 U.S. at 7, 112 S.Ct. at 999. The extent of an inmate's injury is but one of the factors to be considered in determining whether a prison official's use of force was "unnecessary and wanton"; courts should also consider the need for force, whether the force was proportionate to the need, the threat reasonably perceived by the officials, and what, if anything, the officials did to limit their use of force. *Whitley,* 475 U.S. at 321, 106 S.Ct. at 1085 (citing *Johnson,* 481 F.2d at 1033). "But when prison officials use force to cause harm maliciously and sadistically, 'contemporary standards of decency are always violated.... This is true whether or not significant injury is evident.' " *Wright,* 554 F.3d at 268–69 (quoting *Hudson,* 503 U.S. at 9, 112 S Ct. at 1000).

That is not to say that "every malevolent touch by a prison guard gives rise to a federal cause of action." *Griffen,* 193 F.3d at 91 (citing *Romano v. Howarth,* 998 F.2d 101, 105 (2d Cir.1993)); *see also Johnson,* 481 F.2d at 1033 ("Not every push or shove, even if it later may seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights"). Where a prisoner's allegations and evidentiary proffers, if credited, could reasonably allow a rational factfinder to conclude that corrections officers used force maliciously and sadistically, however, summary judgment dismissing an excessive use of force claim is inappropriate. *Wright,* 554 F.3d at 269 (citing *Scott v. Coughlin,* 344 F.3d 282, 291 (2d Cir.2003) (reversing summary dismissal of prisoner's complaint, though suggesting that prisoner's evidence of an Eighth Amendment violation was "thin" as to his claim that a corrections officer struck him in the head, neck, shoulder, wrist, abdomen, and groin, where the "medical records after the ... incident with [that officer] indicated only a slight injury")) (other citations omitted).

***6** The allegations set forth in plaintiff's complaint, if credited, would plainly satisfy both the objective and subjective prongs of the controlling Eighth Amendment test. [4] Plaintiff alleges that defendants Decker, Brodhead, Legg, and Cunningham entered his cell, sprayed mace in his eyes and mouth, placed him in a choke hold and threw him to the concrete floor, where defendant Cunningham kicked him and stomped on his back and neck repeatedly. Once handcuffed, plaintiff maintains that he was dragged by the handcuffs to the elevator where defendant Legg continued to beat him, and that defendants Decker, Brodhead, and Cunningham stood by during the ongoing assault by defendant Legg. [5] Plaintiff further asserts that he was then taken to the shower, where he was scalded with hot water and again sprayed with mace. These allegations, if credited, could suffice to establish a claim of unlawful use of excessive force in violation of the Eighth Amendment. *See Velez v. McDonald,* No. 3:10cv483 2011 WL 1215442, at *3–4 (D.Conn. Mar.27, 2011); *Edwards v. City of New York,* 08–cv–2199, 2010 WL 3257667, at * 4 (E.D.N.Y. Aug.16, 2010). [6]

From the conflicting accounts given by the parties this case would appear to squarely present an issue

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of credibility not appropriately resolved on motion for summary judgment. *Rule v. Brine, Inc.,* 85 F.3d 1002, 1011 (2d Cir.1996) (citing, *inter alia, Anderson,* 477 U.S. at 255, 106 S.Ct. 2513). In moving for summary judgment despite this limitation it may be that defendants are attempting to invoke the limited exception created by the court in *Jeffreys v. City of New York,* 426 F.3d at 549. In that action, the Second Circuit recognized a very narrow exception to the otherwise steadfast rule against resolving issues of credibility on a motion for summary judgment. *Slacks v. Gray,* No. 9:07–CV–510, 2009 WL 3164782, at *13 (N.D.N.Y. Sept.29, 2009) (Mordue, C.J.). The *Jeffreys* court held that summary judgment may be awarded in the rare circumstance where there is nothing in the record to support the plaintiff's allegations, other than his own contradictory and incomplete testimony, and where even after drawing all inferences in a light most favorable to the plaintiff, the court determines that "no reasonable person" could credit the plaintiff's testimony. *Jeffreys,* 426 F.3d at 54–55. In so holding, the court cited with approval the district court's opinion in *Shabazz v. Pico,* 994 F.Supp. 460, 468–71 (S.D.N.Y.1998), which granted summary judgment in an excessive force case based upon the absence of any evidence in the record to corroborate the plaintiff's version of the events, highlighting the "many inconsistencies and contradictions within the plaintiff's deposition testimony and affidavits." *Slacks,* 2009 WL 3164782, at *13 (citing *Jeffreys,* 426 F.3d at 555 and quoting *Shabazz,* 994 F.Supp. at 470). [7]

In this district, it appears that in order to qualify for application of the *Jeffreys* exception a defendant must meet the following three requirements: 1) the plaintiff must rely "almost exclusively on his own testimony"; 2) the plaintiff's testimony must be "contradictory or incomplete"; and 3) the plaintiff's testimony must be contradicted by evidence produced by the defense. *Benitez v. Ham,* No. 9:04–CV–1159, 2009 WL 3486379, at *20–21 (N.D.N.Y. Oct.21, 2009) (Mordue, C.J. and Lowe, M.J.) (citing and quoting *Jeffreys*).

***7** To be sure, as defendants assert, plaintiff's excessive force claims are uniformly contradicted by the flat denials of each of the defendants and lack support from the log entries submitted in support of defendants' motion. Defendants' accounts of the relevant events are also supported by the fact that there is no indication that at or shortly after the time of the incident plaintiff required medical treatment. Nonetheless, this case does not need meet the *Jeffreys* exception for two reasons. First, defendants are unable to cite to any contradictory or incomplete accounts of the relevant events given by the plaintiff. Secondly, while plaintiff's claim principally relies upon his account of the relevant events, there is at least some modest corroborative support for his version, given that the medical evidence now in the record suggests that he sought and obtained medical treatment for a hand injury beginning in October of 2008, three months after the alleged assault. *See* Plaintiff's Exhibits (Dkt. No. 42). While there is nothing in plaintiff's medical records directly linking his injuries to the alleged assault, and in fact one entry reflects the finding of edema to plaintiff's left hand of "unknown cause", nonetheless drawing all inferences in plaintiff's favor, a reasonable factfinder could conclude that the injury stems from the fact that plaintiff was tightly handcuffed and that defendants dragged him by those handcuffs during the July 2008 incident, as alleged in plaintiff's complaint. *See Scott,* 344 F.3d at 282; *Kerman v. City of New York,* 261 F.3d 229, 239 (2d Cir.2001) ("If the jury were to credit [plaintiff's] version of the facts and believe his allegations of handcuff tightening, infliction of pain, verbal abuse, humiliation and unnecessary confinement to a restraint bag in a painful position, our prior cases indicate that the use of force under [defendant's] supervision might well be objectively unreasonable and therefore excessive."). For these reasons, I recommend that the court not invoke the narrow *Jeffreys* exception to the otherwise staunch rule that issues of credibility must be resolved at trial, rather than on a motion for summary judgment, and that it deny defendants' motion.

C. *Qualified Immunity*

In addition to their contention that the court should grant them summary judgment on the merits, defendants additionally contend that they are entitled to qualified immunity from suit. Qualified immunity shields government officials performing discretionary functions from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) (citations omitted). "In assessing an officer's eligibility for the shield, 'the appropriate question is the objective inquiry whether a reasonable officer could have believed that [his or her actions were] lawful, in light of clearly established law and the information the officer[ ] possessed." *Kelsey*

v. County of Schoharie, 567 F.3d 54, 61 (2d Cir.2009) (quoting *Wilson v. Layne,* 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). The law of qualified immunity seeks to strike a balance between the need to hold government officials accountable for irresponsible conduct and the need to protect them from "harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009).

***8** In *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Supreme Court "mandated a two-step sequence for resolving government official's qualified immunity claims." *Pearson,* 555 U.S. at 232, 129 S.Ct. at 815–16. The first step requires the court to consider whether, taken in the light most favorable to the party asserting immunity, the facts alleged show that the conduct at issue violated a constitutional right,[8] *Kelsey,* 567 F.3d at 61, with "the second step being whether the right is clearly established", *Okin v. Village of Cornwall–On–Hudson Police Dept.,* 577 F.3d 415, 430 n. 9 (citing *Saucier*).[9] Expressly recognizing that the purpose of the qualified immunity doctrine is to ensure that insubstantial claims are resolved prior to discovery, the Supreme Court recently retreated from the prior *Saucier* two-step mandate, concluding in *Pearson* that because "[t]he judges of the district courts and courts of appeals are in the best position to determine the order of decisionmaking [that] will best facilitate the fair and efficient disposition of each case", those decision makers "should be permitted to exercise their sound discretion in deciding which of the ... prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand."[10] *Pearson,* 555 U.S. at 236, 242, 129 S.Ct. at 818, 821. In other words, as recently emphasized by the Second Circuit, the courts "are no longer *required* to make a 'threshold inquiry' as to the violation of a constitutional right in a qualified immunity context, but we are free to do so." *Kelsey,* 567 F.3d at 61 (citing *Pearson,* 129 S.Ct. at 821) (emphasis in original).

For courts engaging in a qualified immunity analysis, "the question after *Pearson* is 'which of the two prongs ... should be addressed in light of the circumstances in the particular case at hand.' " *Okin,* 577 F.3d 430 n. 9 (quoting *Pearson*). "The *[Saucier* two-step] inquiry is said to be appropriate in those cases where 'discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all .' " *Kelsey,* 567 F.3d at 61 (quoting *Pearson,* 129 S.Ct. at 818).

In this instance, the right of prison inmate to be free from the use of excessive force was clearly established in July of 2008. *Russo v. City of Bridgeport,* 479 F.3d 196, 212 (2d Cir.2007), *cert. denied,* 552 U.S. 818, 128 S.Ct. 109, 169 L.Ed.2d 24 (2007). Defendants would be hard pressed to show that prison officials in defendants' position could have reasonably believed that the use of excessive force, as alleged in plaintiff's complaint, would not run afoul of the Eighth Amendment's prohibitions. Accordingly, I recommend against a finding that the defendants are entitled to qualified immunity from suit. *See Curry v. City of Syracuse,* 316 F.3d 324, 334 (2d Cir.2003) (reversing grant of summary judgment on qualified immunity grounds finding credibility questions as to whether force was used as well as the surrounding circumstances).

IV. *SUMMARY AND RECOMMENDATION*

***9** Although there is much room for healthy skepticism regarding plaintiff's version of the events surrounding his removal from his C–Pod cell in order to transfer him, for disciplinary reasons, to another area of the jail facility at Ulster, the record now before the court presents directly contradictory versions of the relevant events, with plaintiff alleging facts which, if true, would plainly support a finding that his Eighth Amendment rights were violated, and defendants flatly denying any use of force beyond that necessary to subdue a non-compliant inmate and arrange for his transfer. Such a conflict presents credibility issues that are not appropriately resolved on a motion for summary judgment. Accordingly, it is hereby respectfully

RECOMMENDED that defendants' motion for summary judgment dismissing plaintiff's complaint (Dkt. No. 38) be DENIED in all respects.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(d), 72; *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993).

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It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules; and it is further.

All Citations

Not Reported in F.Supp.2d, 2012 WL 398812

Footnotes

1 In light of the procedural posture of the case the following recitation is derived from the record now before the court, with all inferences drawn and ambiguities resolved in favor of the plaintiff. *Terry v. Ashcroft,* 336 F.3d 128, 137 (2d Cir.2003). It should be noted, however, that many if not most of plaintiff's allegations are sharply contested by the defendants.

2 Defendant Cunningham's affidavit states that the incident occurred at approximately 9:25 p.m. *See* Cunningham Aff. (Dkt. No. 38–1 Exh. C) ¶ 4. It appears clear, however, from the remaining affidavits as well as excerpts of log book entries also before the court that the incident occurred in the morning, rather than the evening, of July 27, 2008. *See, e.g.,* Decker Aff. (Dkt. No. 38–1 Exh. D) ¶ 4; Brodhead Aff. (Dkt. No. 38–1 Exh. E) ¶ 4; *see also* Defendants' Exhibits (Dkt. No. 38–1) Exhs. G and H.

3 It is unclear from the record whether, at the relevant times, plaintiff was a sentenced prisoner or instead a pretrial detainee. In the event that he was a pretrial detainee, his claims are governed by the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, which applies to claims brought by inmates serving prison sentences. *Benjamin v. Fraser,* 343 F.3d 35, 49–50 (2d Cir.2000). In light of pronouncements by the Second Circuit reflecting that similar standards apply to excessive force claims brought under the Eighth and Fourteenth Amendments, resolution of this question is not outcome determinative, and I will therefore analyze plaintiff's claims under the Eighth Amendment. *See Caiozzo v. Koreman,* 581 F.3d 63, 71 (2d Cir.2009); *Corye v. Carr,* No. 9:08–CV–46, 2010 WL 396363, at * 8 n. 9 (N.D.N.Y. Jan.26, 2010) (Kahn, J. and DiBianco, M.J.). Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff.

4 While plaintiff has not submitted an affidavit to support his claims and oppose defendants' motion, the contents of his complaint are sworn to under the penalty of perjury and thus constitute the equivalent of an affidavit for purposes of defendants' summary judgment motion. *Franco v. Kelly,* 854 F.2d 584, 587 (2d Cir.1988) (citing *Pfeil v. Rogers,* 757 F.2d 850, 859 & n. 15 (7th Cir.1985) (noting that documents sworn under penalty of perjury may suffice for summary judgment purposes even if they do not meet all of the formal requirements of a notarized affidavit)), *cert. denied,* 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986).

5 It should be noted that while defendants Decker, Brodhead, and Cunningham may not have actively participated in this portion of the alleged assault, this does not necessarily exonerate those officers from liability. A corrections worker who, while not participating in an assault upon an inmate, is present while it occurs may nonetheless bear responsibility for any resulting constitutional deprivation. *See Anderson v. Branen,* 17 F.3d 552, 557 (2d Cir.1994). It is well-established that a law enforcement official has an affirmative duty to intervene on behalf of an individual whose constitutional rights are being violated in his or her presence by other officers. *See Mowry v. Noone,* No. 02–CV–6257 Fe, 2004 WL 2202645, at *4 (W.D.N.Y. Sept.30, 2004); *see also Curley v. Village of Suffern,* 268 F.3d 65, 72 (2d Cir.2001) ("Failure to intercede results in [section 1983] liability where an officer observes excessive force being used or has reason to know that it will be.") (citations omitted). In order to establish liability on the part of a defendant under this theory, a plaintiff must prove the use of excessive force by someone other than the individual, and that the defendant under consideration 1) possessed actual knowledge of the use by another corrections officer of excessive force; 2) had a realistic opportunity to intervene and prevent the harm from occurring; and 3) nonetheless disregarded that risk by intentionally refusing or failing to take reasonable measures to end the use of excessive force. *See Curley,* 268 F.3d at 72; *see also Espada v. Schneider,* 522 F.Supp.2d 544, 555 (S.D.N.Y.2007).

6 Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff. [Editor's Note: Attachments of Westlaw case copies deleted for online display.]

7 The court in *Shabazz* found that when the facts alleged by the plaintiff are "so contradictory that doubt is cast upon their plausibility," the court may "pierce the veil of the complaint's factual allegations ... and dismiss the claim." *Shabazz,* 994 F.Supp. at 470. While approving of the lower court's reasoning in *Shabazz,* the *Jeffreys* court was careful to distinguish *Fischl v. Armitage,* 128 F.3d 50, 56 (2d Cir.1997), another case it had previously decided, wherein it reversed the grant of summary judgment in an excessive force case. *Jeffreys,* 426 F.3d at 554–55. In doing so, the court emphasized that in *Fischl* the plaintiff's testimony that he was beaten was supported by 1) photographs showing severe bruises, 2) hospital

records showing that he had fractures of the head; 3) a physician's opinion that plaintiff's injuries were consistent with having been kicked in the head; and 4) the fact that the plaintiff's eye socket fracture could not have been self-inflicted. *Id.*

8 In making the threshold inquiry, "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151, 150 L.Ed.2d 272.

9 In *Okin,* the Second Circuit clarified that the " 'objectively reasonable' inquiry is part of the 'clearly established' inquiry", also noting that "once a court has found that the law was clearly established at the time of the challenged conduct and for the particular context in which it occurred, it is no defense for the [government] officer who violated the clearly established law to respond that he held an objectively reasonable belief that his conduct was lawful." *Okin,* 577 F.3d at 433, n. 11 (citation omitted).

10 Indeed, because qualified immunity is "an immunity from suit rather than a mere defense to liability ...", *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Court has "repeatedly ... stressed the importance of resolving immunity questions at the earliest possible stage in the litigation." *Pearson,* 555 U.S. at 231, 129 S.Ct. at 815 (quoting *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 524, 116 L.Ed.2d 589, —— (1991) (per curiam)).

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2009 WL 400639
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. New York.

Anthony MEDINA, Plaintiff,
v.
Warden GONZALEZ, Captain Menge, Captain S. Graham, Captain Boyd, Correction Officer S. Trail, Correction Officer McDonald, Correction Officer M. Lonnborg, Correction Officer Bowden, Correction Officer John Doe One, Correction Officer John Doe Two, Correction Officer John Doe Three, Captain Jane Doe, Defendants.

No. 08 Civ. 01520(BSJ)(KNF).
|
Jan. 9, 2009.

MEMORANDUM and ORDER

KEVIN NATHANIEL FOX, United States Magistrate Judge.

I. INTRODUCTION

***1** Anthony Medina ("Medina"), proceeding *pro se* and *in forma pauperis,* commenced this action, pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, alleging that Warden Gonzalez ("Gonzalez"), Captain Menge ("Menge"), Captain Graham ("Graham"), Captain Boyd ("Boyd"), Correction Officer S. Trail ("Trail"), Correction Officer McDonald ("McDonald"), Correction Officer M. Lonnborg ("Lonnborg"), Correction Officer Bowden ("Bowden"), Correction Officer John Doe One ("Doe One"), Correction Officer John Doe Two ("Doe Two"), Correction Officer John Doe Three ("Doe Three"), and Captain Jane Doe ("Jane Doe") (collectively "defendants")-all of whom were employees of the Robert N. Davoren Correctional Center on Riker's Islandviolated his Eighth and Fourteenth Amendment rights by assaulting him, and conspired to "cover up" the assaults.

Medina requests that the Court appoint counsel to assist him in prosecuting this action and notes that he requires assistance as this case involves: "several different factual and legal claims," "medical issues that will require expert testimony," and conflicting accounts of the incidents in question. In addition, the plaintiff alleges he has "mental health issues, is visually impaired," requires assistance in obtaining discovery materials and locating witnesses, and has "no ability to investigate the facts of this case." The plaintiff notes he has attempted to secure counsel; however: (1) one attorney agreed to represent him and then discontinued representation, (2) another attorney "agreed to take the case but wanted too much of any award, thus the plaintiff refused representation," and (3) a third attorney refused representation. The plaintiff's application, for appointed counsel, is addressed below.

II. BACKGROUND

In his complaint, Medina alleges that, in June 2006, he was transferred from the custody of the New York State Department of Correctional Services ("DOCS") to the custody of the New York City Department of Corrections, at Riker's Island. On June 20, 2006, Gonzalez and a deputy warden were "making rounds of the facility" when they ordered Medina to "surrender his slippers because the slippers belonged to the facility." Medina responded that the slippers belonged to him, as he had brought the slippers with him from DOCS. Menge, Graham, and Doe One "asked [Medina] for the slippers." Medina reiterated that the slippers belonged to him and offered to show a receipt from DOCS verifying his ownership and, when Medina turned to enter his cell to retrieve the receipt, he was sprayed with "Oleoresin Capsiaim spray (mace-pepper spray)" by Menge, Graham and Doe One while Gonzalez and the deputy warden watched. Thereafter, Boyd, Graham, Menge, Trail, McDonald, Lonnborg, Bowden, and John Does Two and Three assaulted the plaintiff in four episodes, as Medina wavered in and out of consciousness. The plaintiff alleged that, after the final assault, he was hospitalized. The scope of the plaintiff's injuries included: "emotional distress" as well as physical injuries ranging from "multiple abrasions and contusions to his right eye, face, lip, left ear, head, chest, neck, back, legs, hand and both wrists; a left eye hemor[r]hage, left ear hemato[m]a, a broken back, arthritis of the spine, nerve damage and paresthesiae." The plaintiff maintains

he continues to be treated for his back injury and nerve damage with pain medications and physical therapy.

***2** With regard to the conspiracy claim, the plaintiff alleges Trail and Lonnborg filed separate "false and misleading" misbehavior reports in furtherance of the conspiracy to "cover up their misconduct." The plaintiff also alleges the defendants conspired to "cover up the attacks" by confiscating evidence, and leaving the plaintiff unconscious in the shower area where he would not be found easily. The plaintiff requests monetary damages and declaratory relief.

III. DISCUSSION

Unlike criminal defendants, prisoners, such as plaintiff, and indigents filing civil actions have no constitutional right to counsel. However, 28 U.S.C. § 1915(e)(1) provides that the Court may request an attorney to represent any person unable to afford counsel. Plaintiff made an application to proceed *in forma pauperis,* which was granted. Therefore, he is within the class to whom 28 U.S.C. § 1915(e)(1) applies.

"In deciding whether to appoint counsel, [a] district [court] should first determine whether the indigent's position seems likely to be of substance." *Hodge v. Police Officers,* 802 F.2d 58, 61 (2d Cir.1986), *cert. denied,* 502 U.S. 986, 112 S.Ct. 596 (1991). This means that it appears to the court "from the face of the pleading[s]," (*see Stewart v. McMickens,* 677 F.Supp. 226, 228 [S.D.N.Y.1988]), that the claim(s) asserted by the plaintiff "may have merit," (*see Vargas v. City of New York,* No. 97 Civ. 8426, 1999 U.S. Dist. LEXIS 10406, at *5; 1999 WL 486926, at *2 [S.D .N.Y. July 9, 1999]), or that the plaintiff "appears to have some chance of success...." *Hodge,* 802 F.2d at 60-61. The pleadings drafted by a *pro se* litigant, such as Medina, are to be construed liberally and interpreted to raise the strongest arguments they suggest. *See Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994).

In order for the plaintiff to prevail on his Eighth Amendment excessive force claim, made pursuant to 42 U.S.C. § 1983, he must show that: (1) objectively, the deprivation alleged is sufficiently serious to reach constitutional dimensions; and (2) subjectively, the defendants must have acted with a "sufficiently culpable state of mind" associated with the "unnecessary and wanton infliction of pain." *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 1977 (1994); *see Romano v. Howarth,* 998 F.2d 101, 105 (2d Cir.1993). Whether conduct is "wanton" depends on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically [to] caus[e] harm." *Hudson v. McMillian,* 503 U.S. 1, 6, 112 S.Ct. 995, 998 (1992) (internal quotations and citations omitted).

Looking solely to the face of the pleadings, it appears that the plaintiff's Eighth Amendment claim may have merit. The plaintiff's factual allegations provide sufficient details to show that he suffered pain and injury, and, though the plaintiff did not surrender his slippers to correction officers immediately, the use of a chemical agent and the repeated assaults alleged do not appear to qualify as "force ... applied in a good-faith effort to maintain or restore discipline," but, rather, appear to have been used "maliciously and sadistically [to] caus[e] harm." *Hudson, supra.*

***3** In order to sustain a claim under 42 U.S.C. § 1985(3), a plaintiff must demonstrate that the defendants acted with racial or other class-based animus in conspiring to deprive the plaintiff of his civil rights. *See United Bhd. of Carpenters & Joiners, Local 610 v. Scott,* 463 U.S. 825, 835, 103 S.Ct. 3352, 3359 (1983) (citing *Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 [1971]). The plaintiff does not allege, in his complaint, that the defendants were motivated by race or some other class-based animus in assaulting him and conspiring to "cover-up" the assaults. As a result, at this juncture, it appears that the plaintiff's claim under 42 U.S.C. § 1985(3) is deficient. By extension, since "a § 1986 claim must be predicated upon a valid § 1985 claim[,]" the plaintiff's § 1986 claim does not appear likely to be of merit. *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 7 F.3d 1085, 1088 (2d Cir.1993).

Despite the appearance of merit to Medina's Eighth Amendment claim, appointing counsel would not be appropriate since, in his request for appointed counsel, Medina states that an attorney had agreed to represent him, but Medina refused counsel's offer because of the portion of the prospective recovery counsel indicated he wanted for his fee. *See Hodge,* 802 F.2d at 61 ("[i]n our view, the language of [28 U.S.C. § 1915] requires that the indigent be unable to obtain counsel before appointment will even be considered"). Therefore, the

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plaintiff's request, that the Court appoint counsel to represent him, is denied.

SO ORDERED.

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2017 WL 684186
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Julio Perez, Plaintiff,
v.
The City of New York; Department of Corrections; Commissioner of N.Y.C. Corrections; Warden of N.Y.C. Corrections; Deputy Warden; Officer Tavares; and John Does # 1 – 4, Captain's Officers Present in Dorm # 2, Bed # 6, Defendants.

17 Civ. 366 (BMC)(LB)
|
Signed February 17, 2017
|
Filed 02/21/2017

Attorneys and Law Firms

Julio Perez, East Elmhurst, NY, pro se.

MEMORANDUM DECISION AND ORDER

Brian M. Cogan, U.S.D.J.

***1** Plaintiff *pro se* Julio Perez, who is currently incarcerated at Rikers Island, brings this action pursuant to 42 U.S.C. § 1983 against the City of New York, New York City Department of Correction ("DOC"), and multiple individual defendants alleging that his constitutional rights were violated when a chemical agent got into his eyes during a prison disturbance and he was denied immediate medical treatment. The Court grants plaintiff's request to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. For the following reasons, the complaint is dismissed with leave to amend to assert a claim for deliberate indifference to plaintiff's serious medical needs.

BACKGROUND

This is the second complaint that plaintiff has filed related to the alleged incident that occurred in June 2016 at the Robert N. Davoren Complex at Rikers Island. The previous complaint was dismissed for failure to state a claim against the named defendants and plaintiff was given leave to file an amended complaint. See Perez v. City of New York Dep't of Corr., No. 16 Civ. 5307, 2016 WL 5477598 (E.D.N.Y. Sept. 29, 2016). Because plaintiff failed to file a timely amended complaint, the action was dismissed and plaintiff's subsequent motion for reconsideration of dismissal was denied. The instant complaint states similar factual allegations to the previous complaint, but, unlike the previous complaint, it names the individual corrections officers that plaintiff alleges are responsible for the alleged deprivation of his constitutional rights.

Plaintiff alleges that he was sitting on his bed when two other inmates began fighting. When a corrections officer sprayed K-9 chemical spray at the fighting inmates, the chemical traveled into plaintiff's eyes due to a fan blowing in plaintiff's direction. Plaintiff alleges that he sought medical attention, but was diverted to the mental health area because of an alarm. When the alarm desisted, plaintiff was returned to his unit without seeing the doctor. Plaintiff alleges that he was not brought to see a doctor until two months after the incident. Plaintiff states that the doctor provided him with eye drops and informed him that he needed glasses due to deterioration of his eyes.

DISCUSSION

Under 28 U.S.C. § 1915A, a district court "shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or employee of a governmental entity." On review, a district court shall dismiss a prisoner complaint *sua sponte* if the complaint is "frivolous, malicious, or fails to state a claim upon which relief may be granted; or seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b). Pursuant to the *in forma pauperis* statute, a district court must also dismiss a case if the court determines that the complaint "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

***2** As an initial matter, the complaint is dismissed as to DOC because New York City agencies, such as DOC, are not suable entities. See N.Y.C. Admin. Code & Charter Ch. 16 § 396; Cuadrado v. New York City Dep't of Corr.,

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No. 08 Civ. 3026, 2009 WL 1033268, at *2 (S.D.N.Y. April 16, 2009) (dismissing the complaint against the New York City Department of Correction because it is not a suable entity). Accordingly, plaintiff's claims against the DOC are dismissed for failure to state a claim upon which relief may be granted.

Here, plaintiff brings claims for deprivations of constitutional rights under 42 U.S.C. § 1983. To sustain a claim brought under § 1983, plaintiff must allege that the conduct complained of (1) "[was] committed by a person acting under color of state law," and (2) deprived ... [him] of rights, privileges or immunities secured by the Constitution or laws of the United States." Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994). Moreover, he must allege the direct or personal involvement of each of the named defendants in the alleged constitutional deprivation. Farid v. Ellen, 593 F.3d 233, 249 (2d Cir. 2010). "Because vicarious liability is inapplicable to ...§ 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). Plaintiff names the Commissioner, the Warden, and the Deputy Warden of the DOC as defendants, but he fails to allege that these supervisory officials participated in the alleged harm or could otherwise be held liable for any deprivation of his constitutional rights. Accordingly, the claims against the Commissioner, the Warden and the Deputy Warden are dismissed.

The complaint is also dismissed as to the City of New York. A municipality can be liable under § 1983 only if the plaintiff can show that a municipal policy or custom caused the deprivation of his or her constitutional rights. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978). There are no such allegations here.

Plaintiff's Eighth Amendment claim regarding allegations of the defendant correction officers' use of K-9 spray to break up a fight between two prisoners, which winded up in plaintiff's eyes due to a blowing fan, is dismissed for failure to state a claim. To state an Eighth Amendment claim for use of excessive force, an inmate's allegations must meet both a subjective and an objective requirement. To meet the subjective requirement, the inmate must show that the prison officials involved "had a wanton state of mind when they were engaging in the alleged misconduct." Griffin v. Crippen, 193 F.3d 89, 91 (2d Cir. 1999). The key question in determining wantonness is " 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' " Wright v. Goord, 554 F.3d 255 (2d Cir. 2009) (quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992)). "[W]ide ranging deference" must be accorded to the actions of prison officials in responding to an inmate confrontation. Whitley v. Albers, 475 U.S. 312, 321 (1986). The objective component requires that the alleged conduct be "sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834 (1994). "[N]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights ... and an allegation indicating a *de minimis* use of force will rarely suffice to state a constitutional claim." Sims v. Artuz, 230 F.3d 14, 22 (2000) (internal quotation marks and citations omitted).

***3** Plaintiff's allegations do not meet either the objective or subjective component for an excessive force claim. Here, the alleged use of force was *de minimis* and reasonable to restore order during the course of the prison disturbance. Plaintiff also fails to allege any facts supporting that the prison officials sprayed the K-9 to "maliciously" cause harm to the two prisoners engaged in the alteration, let alone to plaintiff who was not directly sprayed with the K-9 and who was only affected by the chemical due to a blowing fan. See Hernandez v. C.O. Jones 17628, No. 06 CV 3738, 2006 WL 3335091 (E.D.N.Y. Oct. 10, 2006) (dismissing an inmate's excessive force claim for failure to meet the requirements of an Eighth Amendment claim where the inmate was sprayed with pepper spray during a prison disturbance). At most, plaintiff alleges that the corrections officers should have been more careful and anticipated that the fan might blow the spray in his direction. That is, if anything, a negligence claim, not a constitutional claim.

For similar reasons, plaintiff also fails to state an Eighth Amendment claim for the denial of medical care. A claim for inadequate medical treatment may give rise to a constitutional deprivation where a prisoner alleges "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97 (1976). To sufficiently allege a claim of deliberate indifference, plaintiff must state facts to support that: (1) he suffered from a "serious medical condition," that is a condition that may "produce death, degeneration, or extreme pain," Hill v. Curcione, 657 F.3d

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116, 122 (2d Cir. 2011) (citation and internal quotation marks omitted), and (2) the individual defendants were deliberately indifferent to his serious medical condition, that is they "knew of and disregarded an excessive risk to [plaintiff's] health or safety ..." Caiozzo v. Koreman, 581 F.3d 63, 72 (2d Cir. 2009) (internal quotation marks and citation omitted).

Although the condition of plaintiff's eyes is likely "sufficiently serious" to satisfy the objective component, plaintiff fails to allege facts suggesting that defendants acted with deliberate indifference to his condition. The complaint states that plaintiff was initially prevented from seeing a doctor only because an "alarm" was ringing. There is nothing wrong with that unless plaintiff pleads facts showing that (a) defendants could have taken measures to treat him despite the chaotic events that were occurring during the alarm; and (b) they recklessly disregarded his condition when they could have taken steps to treat him.

After the alarm desisted, plaintiff alleges that he was brought back to his unit without seeing a doctor, but he does not allege any facts indicating that defendants were aware of plaintiff's condition. The complaint also fails to explain why plaintiff did not see a doctor until two months after the incident, or state any facts indicating that defendants were aware of his condition and recklessly ignored it during this time.

CONCLUSION

Plaintiff's request to proceed *in forma pauperis* is granted pursuant to 28 U.S.C. § 1915. The complaint is dismissed for failure to allege a plausible claim to relief pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). In light of plaintiff's *pro se* status, however, he is granted twenty days to amend his complaint if he has a deliberate indifference claim against the individual correctional officers and/or other members of Rikers Island staff. Should plaintiff decide to file an amended complaint, it must be submitted within twenty days of this Order, be captioned "Amended Complaint," and bear the same docket number as this Order. Plaintiff is advised that the amended complaint will completely replace the original complaint, so plaintiff must include in it any allegations from the prior complaint that he wishes to pursue against the individual defendants. Further, if plaintiff fails to comply with this Order within the time allowed, the action shall be dismissed and judgment shall enter.

***4** The court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

All Citations

Slip Copy, 2017 WL 684186

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2012 WL 4501673
Only the Westlaw citation is currently available.
United States District Court,
D. Connecticut.

Miguel RAMOS, Plaintiff,
v.
Angel QUIROS, et al., Defendants.

No. 3:11–CV–1616 (RNC).
|
Sept. 27, 2012.

Attorneys and Law Firms

Miguel Ramos, Newtown, CT, pro se.

INITIAL REVIEW ORDER

ROBERT N. CHATIGNY, District Judge.

***1** Plaintiff, a Connecticut inmate proceeding *pro se* and *in forma pauperis,* brings this action under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* Named as defendants, in their official and individual capacities, are twenty-one officials and employees of the Department of Correction ("DOC") at the following three facilities where the plaintiff has been incarcerated: Corrigan Correctional Institution ("CCI"); [1] Northern Correctional Institution ("NCI"); [2] and Garner Correctional Institution ("GCI"). [3] The plaintiff claims that DOC personnel have been deliberately indifferent to his serious mental health needs, discriminated against him because of his mental disability in violation of the ADA, failed and refused to provide him with essential medication and treatment, retaliated against him for seeking treatment, retaliated against him for complaining and filing grievances, punished him for his mental illness, confined him in inhumane conditions, used excessive force against him in various forms, forcibly medicated him against his will in retaliation for his requests for help, and responded to his requests for help by providing him with razors and encouraging him to commit suicide. The plaintiff seeks money damages plus declaratory and injunctive relief. For reasons that follow, the plaintiff will be permitted to proceed with regard to certain claims under 42 U.S.C. § 1983 and the ADA, but not with regard to other claims, which are legally insufficient and therefore dismissed.

Section 1915A(b)

Pursuant to 28 U.S.C. § 1915A(b), Congress has assigned to federal district courts a duty to conduct an initial review of every complaint filed by an inmate against government officials. To properly perform this initial screening, a court must review the inmate's allegations with care and consider whether they provide the basis for a claim for relief under applicable law. A complaint states a claim upon which relief may be granted if it alleges facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A complaint that includes only " 'labels and conclusions,'... 'a formulaic recitation of the elements of a cause of action' .... [or] 'naked assertion[s]' devoid of 'further factual enhancement' " does not meet the facial plausibility standard. *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 557 (2007)). In applying this standard, *pro se* complaints must be interpreted liberally to raise the "strongest claims that they suggest." *Phelan v. Thomas,* 439 F. App'x 48, 50 (2d Cir.2011).

Plaintiff's Allegations

The forty-three page complaint alleges the following. The plaintiff has a known, documented history of serious mental illness within the DOC, including numerous suicide attempts involving self-mutilation.

***2** In August 2010, while at CCI, the plaintiff experienced stressors that aggravated his mental illness. Mental Health Supervisor John/Jane Doe, acting in concert with Warden Erfe, signed a clearance form for the plaintiff's transfer to NCI's administrative segregation program without doing an adequate mental health screening. The plaintiff was not given notice or a hearing regarding this placement at NCI.

On August 16, 2010, the plaintiff was transferred to NCI and placed in administrative segregation. The NCI defendants failed to conduct an adequate mental health evaluation before placing the plaintiff in segregation. Immediately following this placement, the plaintiff's mental illness worsened due to the harsh conditions of his confinement.

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The plaintiff used an intercom system provided for emergencies to repeatedly request help, explaining that he was in crisis and feeling suicidal. When he used the intercom system to call for help, however, his requests were ignored. On some occasions, unknown officers responded to his intercom calls with sarcasm and urged him to kill himself. Plaintiff also submitted urgent requests in writing that went unanswered.

On October 6, 2010, the plaintiff asked for help via the intercom system. Officer Andrews then issued him a razor, telling him, "Go kill yourself and do it right." [4] The plaintiff used the razor to attempt suicide. He was taken to the UCONN Medical Center for emergency treatment. At UCONN, he received multiple sutures to close two large lacerations. The plaintiff was then returned to NCI and placed on suicide watch in a strip cell in the infirmary. While the plaintiff was in the infirmary, defendant Andrews issued him a disciplinary report based on his suicide attempt. The plaintiff was later found guilty and, as a result, punished for his mental illness.

After the plaintiff was discharged from the infirmary, he was placed in a cell with another suicidal inmate. He was told that if he objected to this arrangement, he would receive another disciplinary report. The plaintiff's severe depression and suicidal thoughts were aggravated by being placed in the cell with the suicidal inmate. The plaintiff sought help from defendants Frayne and Quiros but they did nothing.

On November 6, 2010, the plaintiff witnessed his cellmate attempt suicide by cutting himself with a razor in the shower. The plaintiff's major depression was severely aggravated by this incident and, as a result, he soon attempted to commit suicide by overdosing on medication. Correctional staff were notified. They sprayed the plaintiff with mace, which was punitive and unnecessary. He was placed in non-therapeutic, in-cell restraints, as punishment for his suicidal actions. While thus restrained, he was sprayed again with a chemical agent by Lieutenant Cladio. [5]

For four days, the plaintiff was kept in full, in-cell restraints. The use of these restraints was unnecessary, punitive and harmful. As a result of the in-cell restraints, the plaintiff was prevented from eating properly or accessing the toilet and he soiled himself. Defendant Frayne denied any type of relief and forced the plaintiff to remain in soiled garments. The prolonged placement in these restraints without any relief produced swelling, abrasions and pain and further worsening of the plaintiff's mental illness.

***3** On November 9, 2010, defendant Frayne approved removal of the in-cell restraints and cleared the plaintiff for return to general population without evaluating him or providing him with needed treatment. Thereafter, the plaintiff continued to ask for treatment. He submitted written requests to defendants Frayne and Fuery and verbal requests to numerous members of the mental health staff. His requests were not taken seriously.

On December 4, 2010, defendant Clark provided the plaintiff with a razor, although he knew the plaintiff was on "razor restriction," telling him, "Make sure you're dead by the time I return." Plaintiff used the razor to try to cut an artery and was taken to UCONN Medical Center for emergency treatment, where he received fourteen sutures. He was then returned to the NCI infirmary.

On December 6, 2010, defendant Frayne cleared the plaintiff for return to general population on behavior observation status ("BOS"). The cells for BOS are isolated and cold. BOS is used to punish inmates with mental illness and deter them from seeking help. Being in isolation further aggravated the plaintiff's mental illness. On December 7, he found a sharp object in his cell and used it to cut himself. He smeared blood and feces on his body and repeatedly slammed his head against the wall. He was placed in restraints, denied a shower, and continued on BOS status with no mental health treatment.

In the months that followed, the plaintiff unsuccessfully sought help for his major depression and suicidal thoughts. He complained about the denial of treatment to defendants Frayne, Fuery, Quiros, Powers, Faucher and Gagne. But proper treatment still was not provided. The denial of mental health care aggravated the plaintiff's major depression and made him even more unstable.

The plaintiff's condition was further aggravated by his continuous placements in BOS isolation cells. During these placements, the plaintiff was sprayed with chemical agents, and placed in four-point restraints, with no mattress and only paper to cover himself. These placements were condoned by defendants Quiros, Powers, Faucher, Frayne, Ducate, Fuery, Berger, Gagne, and

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Wright, all of whom received updates and reports concerning the plaintiff's status.

On March 16, 2011, the plaintiff was given a razor by an unidentified correctional officer, who stated, "Can you please get it right this time, you're like a bad penny that won't go away, just die." The plaintiff used the razor to attempt suicide.

On March 24, 2011, the plaintiff sought help from a female social worker, Jill Doe. She retaliated by placing him on BOS status.

On April 14, 2011, while again on BOS status, the plaintiff attempted to hang himself. He received a disciplinary report as punishment for his suicide attempt. Another suicide attempt occurred on May 4, 2011, while the plaintiff was on BOS status. Plaintiff's numerous suicide attempts at NCI were known to defendants Frayne, Gagne, Quiros, Berger, Ducate, Powers and Wright, all of whom were continually kept informed of his status.

***4** On May 11, 2011, the plaintiff was transferred to GCI and placed in the Behavioral Engagement Unit ("BEU"). Shortly before the transfer, the plaintiff had begun a "hunger strike" to protest being placed on a "loaf diet." The transfer to GCI occurred without prior notice and a hearing.

At GCI, a "team" was assigned to provide services to the plaintiff. He sought mental health treatment from members of the team but they failed to help. When his requests for help were denied, he submitted requests for administrative remedies, which were routinely denied by defendants Bogdonoff and Bush. Without appropriate intervention, more suicide attempts followed resulting in severe injuries.

Plaintiff eventually completed the BEU program, but at the time he filed this complaint, he still was not receiving proper treatment for his severe mental illness.

Plaintiff alleges that while he was at NCI, he was medicated involuntarily on numerous occasions in retaliation for his attempts to get help. He alleges that he was "force medicated" by defendants Frayne and Gagne prior to attending court dates. He alleges that the medications left him heavily sedated and incoherent and rendered him legally incompetent when he appeared in court.

Discussion

The plaintiff's allegations, accepted as true and interpreted liberally as required by law, provide a sufficient basis for the following claims:

CCI Defendants:

(1) Section 1983 claims under the Eighth and Fourteenth Amendments for deliberate indifference and denial of procedural due process. In essence, the plaintiff alleges that his documented history of severe mental illness required that he receive a rigorous mental health evaluation, notice and hearing prior to his transfer to NCI's administrative segregation program, since such a transfer involved a substantial risk of serious harm to his health and safety.

No other claims are stated against these defendants.

NCI Defendants:

(2) Section 1983 claims under the First, Eighth and Fourteenth Amendments for retaliation, deliberate indifference, inhumane conditions of confinement, excessive force, and violations of substantive and procedural due process.

(3) A claim under Title II of the ADA, which requires a plaintiff to allege: "(1) that he is a 'qualified individual' with a disability; (2) that he was excluded from participation in a public entity's services ... or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to his disability." *Hargrave v. Vermont,* 340 F.3d 27, 34–35 (2d Cir.2003). These pleading requirements are satisfied when, as here, an inmate alleges that DOC staff denied him mental health care, harassed him, and retaliated against him when he attempted to complain about his treatment. *Phelan v. Thomas,* 439 F. App'x 48, 50 (2d Cir.2011).

No other claims are stated against these defendants.

GCI Defendants

***5** (4) Section 1983 claims under the Eighth Amendment for deliberate indifference.

No other claims are stated against these defendants.

The complaint fails to state a claim for relief against the defendants under the other statutes cited by the plaintiff for the following reasons. To state a claim under section 1981, the plaintiff must allege that he is a member of a racial minority and was subjected to intentional racial discrimination concerning at least one of the activities enumerated in the statute, i.e., he was prevented from making and enforcing contracts, suing and being sued, or giving evidence on the basis of race. *See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 7 F.3d 1085, 1087 (2d Cir.1993). The plaintiff does not allege interference with any of the enumerated activities. Thus, his section 1981 claim fails as a matter of law and is dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Section 1986 provides no substantive rights; it provides a remedy for the violation of section 1985. *See Adickes v. S.H. Kress & Co .,* 398 U.S. 144, 222 n. 28 (1970) (Brennan, J., concurring in part and dissenting in part). Thus, a prerequisite for an actionable claim under section 1986 is a viable claim under section 1985. No such claim is presented. The first two subsections of 42 U.S.C. § 1985 are not relevant to this action: subsection (1) prohibits conspiracies to prevent federal officials from performing their duties; subsection (2) prohibits conspiracies to deter witnesses from participating in state or federal judicial proceedings. The plaintiff is not a federal official and his claims are not related to participation of witnesses in judicial proceedings.

To state a claim under § 1985(3), the plaintiff must allege the following: (1) the defendants were part of a conspiracy; (2) the purpose of the conspiracy was to deprive a person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws; (3) an overt act was taken in furtherance of the conspiracy; and (4) the plaintiff was injured in his person or property or deprived of a right or privilege. *See Griffin v. Breckenridge,* 403 U.S. 88, 102–03 (1971). Importantly, the plaintiff must allege that the conspiracy was motivated by a "racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id.* at 102.

The plaintiff asserts no facts to support a plausible claim of conspiracy on the part of the defendants. Nor does he allege that the actions of any defendant were taken because of his race or other class-based discriminatory animus. The section 1985 claim is therefore dismissed. *See* 28 U.S.C. § 1915A(b)(l). Because the plaintiff has not stated a section 1985 claim, his section 1986 is also dismissed. *See id.*

Accordingly, the Court enters the following orders:

(1) The claims brought pursuant to 42 U.S.C. §§ 1981, 1985 and 1986 are **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(1), and the section 1983 claims for money damages against defendants in their official capacities are **DISMISSED** pursuant to 28 U.S.C. § 1915A(b)(2). [6]

***6** (2) The claims under § 1983 and the ADA will proceed against the defendants as discussed above.

(3) Within fourteen (14) days of this order, the U.S. Marshals Service will serve the summons, a copy of the complaint [doc. # 1] and this order on all the defendants in their official capacities by delivering the necessary documents in person to the Office of the Attorney General, 55 Elm Street, Hartford, CT 06141.

(4) Within fourteen (14) days of this order, the Pro Se Prisoner Litigation Office will ascertain from the Department of Correction Office of Legal Affairs the current work addresses for the defendants and mail waiver of service of process request packets to each defendant in his or her individual capacity at his or her current work address. On the thirty-fifth (35th) day after mailing, the Pro Se Office shall report to the court on the status of all waiver requests. If any defendant fails to return the waiver request, the Clerk shall make arrangements for in-person service by the U.S. Marshals Service and the defendant shall be required to pay the costs of such service in accordance with Federal Rule of Civil Procedure 4(d).

(5) The Pro Se Prisoner Litigation Office will send a courtesy copy of the complaint and this Order to the Connecticut Attorney General and the Department of Correction Legal Affairs Unit.

(6) The Pro Se Prisoner Litigation Office will send written notice to the plaintiff of the status of this action, along with a copy of this Order.

(7) Defendants will file their response to the complaint, either an answer or motion to dismiss, within seventy (70)

days from the date of this order. If the defendants choose to file an answer, they shall admit or deny the allegations and respond to the cognizable claims recited above. They may also include any and all additional defenses permitted by the Federal Rules.

(8) Discovery, pursuant to Federal Rules of Civil Procedure 26 through 37, will be completed within seven months (210 days) from the date of this order. Discovery requests need not be filed with the court.

(9) All motions for summary judgment will be filed within eight months (240 days) from the date of this order.

(10) Pursuant to Local Civil Rule 7(a), a non-moving party must respond to a dispositive motion within twenty-one (21) days of the date the motion was filed. If no response is filed, or the response is not timely, the dispositive motion can be granted absent objection.

So ordered.

All Citations

Not Reported in F.Supp.2d, 2012 WL 4501673

Footnotes

1 The CCI defendants are Warden Scott Erfe and Jane/John Doe Mental Health Supervisor.

2 The NCI defendants are former Warden Angel Quiros, former Deputy Warden Lauren Powers, Dr. Carson Wright, Dr. Gerard Gagne, Clinical Social Worker Odette Bogle, Correctional Officer Clark, Dr. Mark Frayne, Health Services Administrator Richard Furey, Dr. Susan Ducate, and Dr. Robert Berger.

3 The GCI defendants are Warden Scott Semple, Deputy Warden Amonda Hannah, former Unit Manager Henry Falcone, Unit Manager Robert Melms, Dr. Tom Kocienda, Dr. Tod Bogdonoff, Dr. Carson Wright, Dr. Raymond Castro, Clinical Social Worker Nancy Bertulice, and Health Services Administrator Rick Bush.

4 Officer Andrews is not named as a defendant in the complaint.

5 Like Officer Andrews, Lieutenant Cladio is not named as a defendant in the complaint.

6 To the extent the plaintiff seeks to recover money damages against the defendants in their official capacities, any such claims are barred by the Eleventh Amendment and must be dismissed. *See Kentucky v. Graham,* 473 U.S. 159, 169 (1985) (holding that the Eleventh Amendment, which protects the state from suits for monetary relief, also protects state officials sued for damages in their official capacity); *Quern v. Jordan,* 440 U.S. 332, 341 (1979)(affirming that section 1983 does not override a state's Eleventh Amendment immunity).

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Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Raszell REEDER, Plaintiff,
v.
M. HOGAN, et al, Defendants.

No. 9:09–CV–520 (NAM/ATB).
|
June 11, 2013.

Attorneys and Law Firms

Raszell Reeder, Malone, NY, pro se.

Hon. Eric T. Schneiderman, Attorney General for the State of New York, Adrienne J. Kerwin, Esq., Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

Justin C. Levin, Assistant Attorney General.

ORDER

NORMAN A. MORDUE, District Judge.

***1** The above matter comes to me following a Report–Recommendation by Magistrate Judge Andrew T. Baxter, duly filed on the 17th day of May 2013. Following fourteen (14) days from the service thereof, the Clerk has sent me the file, including any and all objections filed by the parties herein.

After careful review of all of the papers herein, including the Magistrate Judge's Report–Recommendation, and no objections submitted thereto, it is

ORDERED that:

1. The Report–Recommendation is hereby adopted in its entirety.

2. Defendant William Allan's summary judgment motion (Dkt. No. 162) is granted, and the complaint is dismissed in its entirety.

3. The Clerk of the Court shall serve a copy of this Order upon all parties and the Magistrate Judge assigned to this case

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

ANDREW T. BAXTER, United States Magistrate Judge.

I. Background

Plaintiff commenced this action pro se, seeking damages for injuries resulting from various incidents occurring between 2007 and 2008. (Dkt. No. 1). Liberally construed, plaintiff's original complaint set forth several First and Eighth Amendment claims, including excessive force, denial of medical care, failure to receive proper Ramadan meals, and challenges to his conditions of confinement. *Id.*

On November 16, 2009, defendants filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). (Dkt. No. 69). While defendants' motion to dismiss was pending, plaintiff filed an amended complaint ("First Amended Complaint") on January 4, 2010. (Dkt. No. 84). Although the motion to dismiss was filed prior to the First Amended Complaint, the only amendment to the original complaint was the addition of two named defendants in place of two of the John/Jane Doe defendants. The new defendants requested that they be allowed to join the pending motion to dismiss. (Dkt.Nos.72, 87). The court granted these requests. (Dkt.Nos.77, 88).

On September 29, 2010, then-Chief District Judge Mordue granted defendants' motion in part and denied it in part. (Dkt. No. 122). On October 8, 2010, this action was referred to Magistrate Judge Victor E. Bianchini for settlement proceedings, pursuant to the Pro Se Prisoner Settlement Program, and the case was stayed in all other respects until the proceedings were completed. (Dkt. No. 124).

On November 1, 2010, plaintiff filed a motion to amend, together with a Second Amended Complaint. (Dkt. No. 129). In light of the stay, the Court did not address the motion. On January 31, 2011, the stay was lifted. (Dkt. No. 133). Before this Court could address plaintiff's November 1, 2010 motion, plaintiff filed another motion to amend on May 4, 2011, together with a Third Amended

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Complaint. (Dkt. No. 141). In an order dated June 22, 2011, this court denied plaintiff's motion to amend filed on May 4, 2011, but granted, in part, the November 1, 2010 motion. (Dkt. No. 145). The operative pleadings were then plaintiff's First Amended Complaint, filed January 4, 2010, without the claims that were dismissed as a result of Judge Mordue's September 29, 2010 Order, read together with plaintiff's Second Amended Complaint. Defendants filed a motion for summary judgment on December 27, 2011. (Dkt. No. 150). Plaintiff filed a response on January 9, 2012. (Dkt. No. 154).

***2** On September 19, 2012, Judge Mordue granted defendants' motion for summary judgment (Dkt. No. 150), and all claims against all defendants were dismissed except for plaintiff's claim based on excessive force against defendant Allan, which was denied without prejudice to defendant Allan filing another summary judgment motion (Dkt. No. 161). On October 19, 2012, defendant Allan filed his motion for summary judgment. (Dkt. No. 162). Plaintiff opposed the motion. (Dkt. No. 165).

II. *Facts and Contentions*

Plaintiff alleges that on August 25, 2008, defendants Uhler, Allen, Marcil, and other correction officers wanted plaintiff to come out of his cell, but he "disagreed with coming out," because "they did not come with [a] camera." (First Am. Compl. ¶ 24, 41). A "distraction unit" was called, bringing a camera, so plaintiff "agreed to come out," but defendants Uhler, Allen, Marcil and others still used mace "repeatedly." *Id.* Plaintiff was placed in full restraints and escorted to the SHU. (First Am. Compl. ¶ 24–25; Pl.'s Dep. 109–12 (Dkt. No. 162–3)).

For the reasons below, the court recommends granting defendant's motion and dismissing plaintiff's complaint in its entirety.

III. *Summary Judgment*

Summary judgment may be granted when the moving party carries its burden of showing the absence of a genuine issue of material fact. Fed.R.Civ.P. 56; *Thompson v. Gjivoje,* 896 F.2d 716, 720 (2d Cir.1990). "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude summary judgment." *Salahuddin v. Coughlin,* 674 F.Supp. 1048, 1052 (S.D.N.Y.1987) (citation omitted). A dispute about a genuine issue of material fact exists if the evidence is such that "a reasonable [fact finder] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In meeting its burden, the party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c)(1)(A). If the moving party satisfies its burden, the nonmoving party must move forward with specific facts showing that there is a genuine issue for trial. *Salahuddin v. Goord,* 467 F.3d 263, 272–73 (2d Cir.2006). In determining whether there is a genuine issue of material fact, a court must resolve all ambiguities, and draw all inferences, against the movant. *See United States v. Diebold, Inc. .,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). However, when the moving party has met its burden, the nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 585–86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 247–48.

IV. Excessive Force

***3** Plaintiff alleges that various correction officers and a "distraction" unit used excessive force against him on August 25, 2008.

A. Legal Standards

Inmates enjoy Eighth Amendment protection against the use of excessive force, and may recover damages under 42 U.S.C. § 1983 for a violation of those rights. *Hudson v. McMillian,* 503 U.S. 1, 9–10, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). The Eighth Amendment's prohibition against cruel and unusual punishment precludes the "unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Sims v. Artuz,* 230 F.3d 14, 20 (2d Cir.2000). To sustain a claim of excessive force under the Eighth Amendment, a plaintiff must establish both objective and subjective elements. *Blyden v. Mancusi,* 186 F.3d 252, 262 (2d Cir.1999).

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In order to satisfy the objective element of the constitutional standard for excessive force, the defendants' conduct must be " 'inconsistent with the contemporary standards of decency.' " *Whitely v. Albers,* 475 U.S. 312, 327, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (citation omitted); *Hudson,* 503 U.S. at 9. "[T]he malicious use of force to cause harm constitute[s][an] Eighth Amendment violation per se[,]" regardless of the seriousness of the injuries. *Blyden,* 186 F.3d at 263 (citing *Hudson,* 503 U.S. at 9). "The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Hudson,* 503 U.S. at 9–10 (citations omitted). " 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.' " *Sims,* 230 F.3d at 22 (citation omitted).

The subjective element requires a plaintiff to demonstrate the "necessary level of culpability, shown by actions characterized by wantonness." *Id.* at 21 (citation omitted). The wantonness inquiry "turns on 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' " *Id.* (quoting *Hudson,* 503 U.S. at 7). In determining whether defendants acted in a malicious or wanton manner, the Second Circuit has identified five factors to consider: the extent of the injury and the mental state of the defendant; the need for the application of force; the correlation between that need and the amount of force used; the threat reasonably perceived by the defendants; and any efforts made by the defendants to temper the severity of a forceful response." *Scott v. Coughlin,* 344 F.3d 282, 291 (2d Cir.2003).

B. Application

Plaintiff claims that on August 25, 2008, Sergeant Rendle told plaintiff to get dressed so he could return to his cell in the Special Housing Unit ("SHU"). (Pl.'s Dep. 101) (Dkt. No. 162–3). Plaintiff said that he and Sergeant Rendle exchanged "disrespectful statements," and he told Sergeant Rendle, "The door is locked, but when I catch you, you know I'm going to hurt you ." (Pl.'s Dep. 101–02). Because plaintiff refused to comply with direct orders, it was apparent that plaintiff was not going to voluntarily leave his cell, and an extraction team was called.

***4** Sergeant Rendle's report states that when he returned to plaintiff's cell with the extraction team, plaintiff was standing in his cell with something in his right hand. (Dkt. No. 162–9 at 18). Sergeant Rendle ordered plaintiff several times to drop what he was holding in his hand, after which plaintiff threw it against the door of the cell and retrieved what appeared to Sergeant Rendle to be feces from the toilet. *Id.* Sergeant Rendle's report indicates that plaintiff continued to refuse to comply with direct orders. *Id.* In an effort to subdue plaintiff so he could be removed from his cell, the extraction team used chemical agents. *Id.* Even after the chemical agents were used, plaintiff refused to comply, so the extraction team entered and restrained plaintiff. *Id.*

Plaintiff disputes the reason why the extraction team came to his cell on August 25, 2008, and claims that he complied with instructions and stood with his back to the door so he could be handcuffed. (Pl.'s Dep. 103–04). Plaintiff claims that Sergeant Rendle started spraying mace at plaintiff without provocation or warning. (Pl.'s Dep. 104–05). Plaintiff claims that when the members of the extraction unit told him to get on the floor, he complied. (Pl.'s Dep. 105–07). Plaintiff testified that after he was handcuffed, no more mace was sprayed. (Pl.'s Dep. 117). The chemical agent affected plaintiff's eyes and his breathing, and within one minute he was taken to the decontamination shower, and within seven minutes, the effects from the chemical agent were gone. (Pl.'s Dep. 113, 115). Plaintiff claims that defendant Allan is responsible for the use of excessive force against him on August 25, 2008. The other officers on the extraction team are not defendants in this action. [1]

Defendant Allan was one of the lieutenants in charge of the Correction Emergency Response Team (CERT) at Clinton in August 2008. (Dkt. No. 162–9 at 1–2). The record contains a declaration by defendant Allan, who affirmed that he was called to plaintiff's cell on August 25, 2008, and he attempted to convince plaintiff to comply with orders to exit his cell so he could be escorted back to the SHU. (Dkt. No. 162–9 at 2). Defendant Allan affirmed that plaintiff continued to ignore orders to exit his cell, and defendant Allan then ordered Sergeant Rendle to use force to extract plaintiff from his cell. Sergeant Rendle sprayed two one-second bursts of chemical agents a total of five times at plaintiff. (*Id.*). Defendant Allan affirmed that even after the chemical agents were sprayed, plaintiff still would not exit his cell. (*Id.*). The extraction

team then entered plaintiff's cell and using body holds, placed plaintiff in restraints and escorted him to the decontamination shower. (*Id.*). Plaintiff was escorted to the SHU, where he was examined by defendant Nurse Farnan, who found no injuries. (Dkt. No. 162–9 at 15).

Defendant Allan submitted a video of the cell extraction that occurred on August 25, 2008. [2] (Dkt. No. 159). The video is approximately 30 minutes long and documents the cell extraction team at plaintiff's cell through when he arrives at his new cell. (*Id.*). The video depicts that when the extraction team arrives at the cell, plaintiff is given one last direct order to exit the cell, and he is told to come to the front of the cell so he can be handcuffed through the food slot. (*Id.* at 2:32:30). Plaintiff approaches the door to the cell, and one of the extraction team asks what is in plaintiff's hand. (*Id.* at 2:32:47). Plaintiff is repeatedly told to drop what he has in his hand. (*Id.* at 2:32:48, 50, 52, 55). At that point, plaintiff backs away from the door and goes to the floor. (*Id.* at 2:32:54). He is again told repeatedly to drop what he has in his hand (*Id.* at 2:32:58; 2:33:00, 04, 06, 09, 22, 24, 30, 54, 55, 56; 2:34:11, 22, 39, 42, 50), and get away from the toilet (*Id.* at 2:34:37; 2:35:08, 11, 29, 32). A member of the team is heard to remark, "He almost got you that time," apparently in reference to plaintiff throwing material at the cell door. (*Id.* at 2:35:05). After plaintiff is subdued by the extraction team, the camera pans over the door, showing where what appears to be feces have been thrown at the door. (*Id.* at 2:36:49–53). The camera also shows a toilet that has been used, but not flushed. (*Id.* at 2:36:55–57).

***5** The video corroborates that when plaintiff approached the door, he was not complying with orders, but instead had what was apparently feces in his hand. When he was asked to drop what he was holding, plaintiff moved away from the door. Defendant Allan authorized the use of chemical agents to subdue plaintiff, allowing the extraction team to enter his cell and restrain him. Plaintiff was repeatedly warned and refused to comply with the guards' orders. He then escalated his defiance by throwing feces at the door of his cell.

No reasonable finder of fact would credit plaintiff's claims that he was compliant with orders to exit his cell peacefully. Defendant Allan did not authorize the use of force to subdue plaintiff without provocation. The defendants used necessary force to restore discipline and subdue plaintiff, who was aggressively refusing to comply with orders. In addition, defendants' actions indicate that their use of chemical agents was in response to the perceived threat that plaintiff aggressively refuse to comply. Defendants have shown that there is no issue of fact as to either of the elements of an Eighth Amendment violation. Accordingly, the claim against defendant Allan should be dismissed. *See, e.g., Alston v. Butkiewicus,* No. 3:09–CV207, 2012 WL 6093887, 2012 U.S. Dist. LEXIS 173770, at *40–42 (D.Conn. Dec. 7, 2012) (use of chemical agent did not constitute excessive force when inmate refused to comply with direct orders); *Carolina v. Pafumi,* No. 3:12–cv–163, 2013 WL 1673108, 2013 U.S. Dist. LEXIS 55209, at *8–12 (D.Conn. April 17, 2013) (use of chemical agent to subdue noncompliant inmate did not constitute excessive force); *Green v. Morse,* 2009 U.S. Dist. LEXIS 42368, at *38, 42, 2009 WL 1401642 (use of chemical agent on noncompliant inmate did not constitute excessive force).

WHEREFORE, based on the findings above, it is

RECOMMENDED, that defendant's summary judgment motion (Dkt. No. 162), be **GRANTED,** and the complaint **DISMISSED IN ITS ENTIRETY.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(e), 72.

All Citations

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Footnotes

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1 The Use of Force Report dated August 25, 2008, indicates that R. Rendle, M. Chagnon, N. Moore, E. Owen, and T. Saunders assisted on the extraction team, none of whom were named as defendants in this action. (Dkt. No. 162–9 at 11, 14).

2 The court may rely on the video of the relevant events in concluding that no reasonable fact finder could credit the plaintiff's inconsistent claims about the incident. *See, e.g., Kalfus v. New York and Presbyterian Hosp.,* 476 F. App'x 877, 880–81 (2d Cir.2012) (the video demonstrated that plaintiff resisted arrest by refusing to stand up or be handcuffed, and that the patrolmen used only reasonable force to overcome his resistance; no reasonable fact finder could conclude that defendants applied excessive force); *Green v. Morse,* 00–CV–6533, 2009 WL 1401642, 2009 U.S. Dist. LEXIS 42368, at *27 (W.D.N.Y. May 18, 2009) (this court may rely on the video evidence clearly showing that some use of force was necessary to grant summary judgment and dismiss plaintiff's excessive force claim) (citations omitted).

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United States District Court,
S.D. New York.

Jose SANTOS, Plaintiff,
v.
NEW YORK CITY DEPARTMENT OF CORRECTION, et al., Defendants.

No. 08 Civ. 8790(GBD)(THK).
|
Feb. 25, 2010.

REPORT AND RECOMMENDATION

THEODORE H. KATZ, United States Magistrate Judge.

***1 TO: HON. GEORGE B. DANIELS, UNITED STATES DISTRICT JUDGE**

FROM: THEODORE H. KATZ, UNITED STATES MAGISTRATE JUDGE

Plaintiff Jose Santos ("Plaintiff"), proceeding *pro se,* brings this action pursuant to 42 U.S.C. § 1983, against Defendants the New York City Department of Correction ("DOC"), Correction Officer Brown ("Defendant Brown"), Correction Officer Arias ("Defendant Arias"), and Correction Officer Waiters ("Defendant Waiters") (collectively, "Defendants"), alleging that they violated his rights under the Eighth Amendment of the United States Constitution.

Presently before the Court is Defendants' Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. The motion was referred to this Court for a Report and Recommendation, in accordance with 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72.1(a) of the Local Civil Rules of the Southern District of New York. For the reasons that follow, the Court recommends that the motion be denied in part, and granted in part.

BACKGROUND

The following facts, taken from Plaintiff's Amended Complaint, dated November 20, 2008 ("Am.Compl.") unless otherwise noted, are presumed to be true for the purposes of evaluating the instant motion:

The events at issue in this action took place at the Rikers Island prison facility, where Plaintiff was incarcerated during the relevant period. (*See* Am. Compl. ¶ 2.) On April 15, 2008, Plaintiff was standing in line, waiting to receive his dinner tray. (*See id.* ¶¶ 8, 9.) He observed Defendant Brown "playing with another inmate in a sexual manner" in a dorm area that adjoined the area where food was being served. (*See id.* ¶ 9.) Defendant Brown became upset with the other inmate, and told him that she was "going to get him." (*See id.* ¶ 10.) Defendant Brown then picked up a fire extinguisher and chased the other inmate, who ran into the food-service area where Plaintiff was standing. (*See id.* ¶ 11.)

Defendant Brown sprayed the extinguisher at the fleeing inmate, but her aim was apparently inexact: the high-pressure stream of chemicals from the extinguisher hit Plaintiff in the face and left eye. (*See id.* ¶ 12.) When the chemicals hit Plaintiff, he immediately lost sight, and felt "burn[ing]" and "extreme pain" in his eye and on his skin. (*See id.*)

Plaintiff requested that Defendant Brown take him to a hospital or clinic to be treated, and asked to see a captain. (*See id.* ¶ 13.) In response, Defendant Brown allegedly told him that she "did not care if [he] died," and ordered him to "get the fuck away from her." (*See id.* ¶ 14.) Plaintiff then asked Defendant Arias, who had witnessed Brown spraying the fire extinguisher, to send him to the clinic, but Arias told him that he was "just the Meal Relief Officer," and could not do anything to help Plaintiff with his burning eye and skin. (*See id.*) Plaintiff requested the same help from Defendant Waiters, but she too refused, telling Plaintiff that she did not want to get involved because Defendant Brown was the "A–Officer." (*See id.* ¶ 16.)

***2** Plaintiff attempted to rinse off the chemicals himself by splashing water on his face and eyes. (*See id.*) After the officers again refused his request to go to the clinic for treatment, Plaintiff placed a call to his family, and told them what had happened. (*See id.* ¶ 17.) They immediately called the prison to inform them that Plaintiff was being denied medical care after being sprayed in the face and eye with chemicals. (*See id.*) An unnamed "female captain," who is not a defendant in this action, then arrived to

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investigate the incident, and sent Plaintiff to the clinic approximately two hours later. (*See id.* ¶ 18.)

The medical personnel at the prison's clinic spent four to five hours flushing the chemicals from Plaintiff's face and eye, and then sent him to a doctor for further examination and treatment. (*See id.* ¶¶ 19–20.) The doctor, an eye specialist, took x-rays and gave Plaintiff medication. (*See id.* ¶ 19.) He informed Plaintiff that he was lucky not to have lost an eye, because the chemicals in the fire extinguisher, sprayed at such high pressure, could have caused severe damage. (*See id.* ¶ 20.) The doctor found that the chemicals had caused partial vision loss, and that Plaintiff's left eye was "extremely irritated." (*See id.*)

DISCUSSION

Plaintiff contends that his Eighth and Fourteenth Amendment rights [1] were violated when Defendant Brown sprayed him with the fire extinguisher, and when Defendants Brown, Arias, and Waiters (the "Individual Defendants") refused to provide him with medical care for the injuries he suffered. He also claims that the Individual Defendants and DOC "fostered an [u]nwritten [p]olicy in which [f]emale [c]orrection [o]fficers are allowed to [p]lay [s]exual [g]ames with [i]nmates," and that this policy led to the injuries he suffered. (*See* Am. Compl. ¶ 22.)

Defendants have moved to dismiss Plaintiff's claims, arguing, among other things, that he has failed to state an Eighth Amendment claim against Defendant Brown for spraying him with the fire extinguisher, because he has not alleged that she maliciously or sadistically intended to harm him (*see* Defendants' Memorandum of Law in Support of Motion to Dismiss, dated May 14, 2009 ("Def.'s Mem."), at 8–10); that he has failed to state an Eighth Amendment claim against any of the Individual Defendants for failure to provide him with medical care because he has not alleged a "serious medical need" to which they were deliberately indifferent (*see id* . at 11–15); that DOC is not a suable entity and therefore not a proper party to this action (*see id.* at 15–16); and that, to the extent Plaintiff's claims are construed to be against the City of New York rather than DOC, they are insufficient because Plaintiff has failed to adequately allege the existence of a city policy or custom responsible for the alleged violation of his constitutional rights (*see id.* at 16–18).

I. Standard of Review

***3** In deciding a motion to dismiss under Rule 12(b)(6), a court "must accept as true all of the factual allegations set out in [the] plaintiff's complaint, draw inferences from those allegations in the light most favorable to [the] plaintiff, and construe the complaint liberally." *Roth v. Jennings,* 489 F.3d 499, 510 (2d Cir.2007) (quoting *Gregory v. Daly,* 243 F.3d 687, 691 (2d Cir.2001)); *see also Weixel v. Bd. of Educ.,* 287 F.3d 138, 145 (2d Cir.2002). "This is especially true when dealing with *pro se* complaints alleging civil rights violations." *Weixel,* 287 F.3d at 146.

Yet, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal quotation marks and citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* ––U.S. ––––, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868, (2009) (quoting *Twombly,* 550 U.S. at 570, 127 S.Ct. at 1974). A claim meets that facial plausibility standard when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949.

"[W]here the facts alleged in the challenged pleading are ambiguous as to whether the conduct alleged is sufficient to warrant a finding of culpability, the determination as to whether a pleading articulates facts sufficient to state a claim upon which relief may be granted [must] include[ ] an assessment as to whether sufficient facts are alleged to make the plaintiff's allegations of wrongdoing 'plausible.' " *Tierney v. Omnicom Group, Inc.,* No. 06 Civ. 14302(LTS) (THK), 2007 WL 2012412, at *3 (S.D.N.Y. July 11, 2007); *see also Ruotolo v. City of New York,* 514 F.3d 184, 188 (2d Cir.2008) ("To survive a motion to dismiss, a complaint must plead enough facts to state a claim to relief that is plausible on its face.") (internal quotation marks and citation omitted).

II. The Fire Extinguisher Incident

Plaintiff claims that Defendant Brown violated his Eighth Amendment rights when she sprayed the fire extinguisher,

hitting him in the face and eye with a high-pressure stream of chemicals, thereby causing him "extreme pain," temporary blindness, and severe eye irritation. Defendants argue that Plaintiff has failed to state the objective element of an Eighth Amendment claim because his injuries were insufficiently serious (*see* Defs.' Mem. at 8), and because spraying the fire extinguisher did not constitute a "use of force" (*see id.*). Defendants further contend that Plaintiff cannot satisfy the subjective element of an Eighth Amendment violation because he alleges that Officer Brown intended to spray the other inmate, and did not "maliciously or sadistically" intend to harm Plaintiff. (*See id.* at 9.)

***4** The Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners from the "unnecessary and wanton infliction of pain." *Hudson v. McMillian,* 503 U.S. 1, 5, 112 S.Ct. 995, 998, 117 L.Ed.2d 156 (1992). In the prison context, it not only limits prison officials' authority to use force, *see Whitley,* 475 U.S. at 327, 106 S.Ct. at 1088, but also imposes an affirmative duty on prison officials to protect prisoners from harm and provide for their basic needs, *see Farmer,* 511 U.S. at 834–35, 114 S.Ct. at 1976–77; *Helling,* 509 U.S. at 31–32, 113 S.Ct. at 2480–81; *Estelle v. Gamble,* 429 U.S. 97, 103–04, 97 S.Ct. 285, 290–91, 50 L.Ed.2d 251 (1976). Thus, Eighth Amendment analysis in the prison context has primarily taken two paths: one as applied to cases alleging that prison officials used excessive force, and the other as applied to cases alleging that prison officials have failed to provide adequate conditions of confinement.

Eighth Amendment claims have both a subjective component, which focuses on whether the defendant's state of mind was sufficiently culpable, that is, whether it was wanton, and an objective component, which considers whether an injury or condition was serious enough to warrant Eighth Amendment protection. *See Wilson v. Seiter,* 501 U.S. 294, 298–99, 111 S.Ct. 2321, 2324–25, 115 L.Ed.2d 271 (1991); *see also Hudson,* 503 U.S. at 8, 112 S.Ct. at 1000. The particular objective and subjective standard to be applied "depends upon the constraints facing the official." *Wilson,* 501 U.S. at 303, 111 S.Ct. at 2326. Courts recognize that prison officials responding to a riot or other emergency must balance the need to maintain prison safety and security against the need to be restrained in their use of force. Thus, in excessive-force claims, the inquiry focuses on whether the charged official used force in a good-faith attempt to maintain order, or maliciously and sadistically to cause harm. *See id.* at 302, 111 S.Ct. at 2326. In conditions-of-confinement cases, no such competing concerns are present. The charged official need only have been "deliberately indifferent" to a significant risk of harm to an inmate's health or safety. *See id.* at 303, 111 S.Ct. at 2327.

Defendants construe Plaintiff's claim against Defendant Brown as one alleging excessive force in violation of the Eighth Amendment. However, the claim does not fit easily into the excessive-force framework because, according to the Complaint, (1) Defendant Brown's use of the fire extinguisher had nothing to do with maintaining prison security, and (2) the object of her use of force was another inmate, not Plaintiff. In the Court's view, the factual scenario alleged by Plaintiff is more comfortably analyzed as a claim that Officer Brown created an unconstitutionally dangerous condition of confinement —that she was deliberately indifferent to a serious risk that Plaintiff would be harmed when she gratuitously and indiscriminately sprayed a high-pressure stream of chemicals from the fire extinguisher. *See Hope v. Pelzer,* 536 U.S. 730, 738, 122 S.Ct. 2508, 2514, 153 L.Ed.2d 666 (2002) (treating the handcuffing of an inmate to a hitching post, with the handcuffs above shoulder height and cutting into the inmate's wrists, after safety concerns had abated, as a prison condition that constituted deliberate indifference to the prisoner's health and safety); *Farmer,* 511 U.S. at 832–33, 114 S. Ct at 1976–77 (prison officials' duty to provide adequate conditions of confinement includes duty to take "reasonable measures to guarantee the safety of inmates"); *Helling,* 509 U.S. at 35, 113 S.Ct. at 2481 (exposure of inmate to environmental tobacco smoke could state Eighth Amendment claim for a condition of confinement that created a significant risk of harm); *LaBounty v. Coughlin,* 137 F.3d 68, 73 (2d Cir.1998) (knowingly exposing inmate to friable asbestos particles in the air was sufficient to state Eighth Amendment claim of deliberate indifference to inmate health and safety); *see also Varella v. Adams,* No. 1CV03624OWWLJOP, 2006 WL 279329, at *3 (E.D.Cal. Feb.6, 2006) (where inmates were alleged to have been knowingly transported in a vehicle in a dangerous manner, and injuries ensued, the allegations were sufficient to state an Eighth Amendment claim of deliberate indifference to inmate safety).

***5** However, Defendants have addressed the claim as an excessive-force claim, and there are a limited number of cases that employ excessive-force analysis when the

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plaintiff was not the force's intended object. Therefore, the Court will determine whether the Complaint states a claim for relief under the Eighth Amendment, applying both an excessive-force and a conditions-of-confinement analysis.

A. *Dangerous Condition of Confinement*

1. *Legal Standard*

Prison officials have an affirmative duty to provide for prisoners' basic needs, including their "reasonable safety." *See Farmer,* 511 U.S. at 837, 114 S.Ct. at 1979 (safety from attacks by other inmates); *Helling,* 509 U.S. at 32–33, 113 S.Ct. at 2480–81 (safety from dangers posed by secondhand smoke); *Wilson,* 501 U.S. at 303–05, 111 S.Ct. at 2327–28 (safety from dangerous conditions of confinement, including "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates"). "The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.,* ... reasonable safety-it transgresses the substantive limits on state action set by the Eighth Amendment." *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 U.S. 189, 200, 109 S.Ct. 998, 1005, 103 L.Ed.2d 249 (1989). Such wanton pain and suffering is "simply not part of the penalty that criminal offenders pay for their offenses against society." *United States v. Walsh,* 194 F.3d 37, 49 (2d Cir.1999) (citing *Boddie v. Schneider,* 105 F.3d 857, 861 (2d Cir.1997)).

To satisfy the objective element of a conditions-of-confinement claim, a plaintiff must allege that the challenged activity or condition posed "a substantial risk of serious harm." *See Hope,* 536 U.S. at 738, 122 S.Ct. at 2514; *Farmer,* 511 U.S. at 833–34, 114 S.Ct. at 1976–77; *Helling,* 509 U.S. at 35, 113 S.Ct. at 2481. Mere discomfort that does not pose a serious risk to health or safety will not satisfy this standard. *See Trammel v. Keane,* 338 F.3d 155, 165 (2d Cir.2003) (deprivation of mattress, toiletries, and nearly all clothing for approximately two weeks—while perhaps uncomfortable—did not pose serious risk to inmate health and safety).

The subjective analysis focuses on whether the charged official was "deliberately indifferent" to a risk of serious harm to a prisoner's health or safety. *See Hope,* 536 U.S. at 737–38, 122 S.Ct. at 2514–15; *Trammel,* 338 F.3d at 162–63; *Phelps v. Kapnolas,* 308 F.3d 180, 185–86 (2d Cir.2002). Deliberate indifference entails "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result ." *Farmer,* 511 U.S. at 835, 114 S.Ct. at 1978. However, the charged official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Phelps,* 308 F.3d at 186 (quoting *Farmer,* 511 U.S. at 837, 114 S.Ct. at 1979). Essentially, a defendant must, at a minimum, act with reckless disregard of a serious risk of harm. "[R]ecklessness entails more than mere negligence; the risk of harm must be substantial and the official's actions more than merely negligent." *Salahuddin v. Goord,* 467 F.3d 263, 280 (2d Cir.2006). However, "[a] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Phelps,* 308 F.3d at 186 (quoting *Farmer,* 511 U.S. at 842, 114 S.Ct. at 1981).

2. *Application*

***6** The risk of harm to Plaintiff's health and safety posed by Defendant Brown's alleged conduct was not so insignificant that, as a matter of law, it could not satisfy the objective prong of an Eighth Amendment violation. As set forth in the Amended Complaint, as a result of Defendant Brown's actions, Plaintiff suffered "extreme pain," partial temporary blindness, and severe eye irritation. (*See* Am. Compl. ¶¶ 12, 16, 20.) His injuries required hours of medical care, as well as medication. (*See id.* ¶¶ 19–20.) The doctor who treated Plaintiff is alleged to have informed him that he had been lucky not to lose the eye completely, due to the corrosive nature of the chemicals and the high pressure at which they were sprayed. (*See id.* ¶ 20.) A dangerous prison condition that leads to extreme pain, temporary eye damage, and the potential for loss of sight, is sufficiently serious to implicate the Eighth Amendment. *See, e.g., Brock v. Wright,* 315 F.3d 158, 163 (2d Cir.2003) (a painful facial scar that was source of chronic pain was sufficiently serious to meet the objective element of an Eighth Amendment violation; "We do not ... require an inmate to demonstrate that he or she experiences pain that is at the limit of human ability to bear, nor do we require a showing that his or her condition will degenerate into a life-threatening one."); *Hemmings v. Gorczyk,* 134

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F.3d 104, 106–09 (2d Cir.1998) (a torn achilles tendon that caused swelling and pain satisfied objective prong of Eighth Amendment violation); *Williams v. Smith,* No. 02 Civ. 4338(DLC), 2009 WL 2431948, at *8–10 (S.D.N.Y. Aug.10, 2009) (severe back pain satisfied objective prong). Indeed, eye impairments that have been found sufficiently serious to satisfy the objective element of an Eighth Amendment violation for denial of medical care include the deprivation of proper eyeglasses, causing visual impairments such as double vision and the loss of depth perception, *see Koehl v. Dalsheim,* 85 F.3d 86, 88 (2d Cir.1996); poor lighting, causing eye strain and fatigue, *see Amaker v. Goord,* No. 98 Civ. 3634(JGK), 1999 WL 511990, at *7 (S.D.N.Y. July 20, 1999); a delay in receiving eyeglasses, causing eye strain and fatigue, *see Myrie v. Calvo,* 591 F.Supp.2d 620, 627 (S.D.N.Y.2008); and an infection causing the loss of vision in the right eye and damage to the left, *see Hines v. Gandham,* No. 9:08 CV 553(GLS)(DLH), 2009 WL 537541, at *7 (N.D.N.Y. Mar. 3, 2009). If these conditions are serious enough to impose an affirmative duty on prison officials to provide sufficient medical care to prevent and treat them, there can be little argument that they are not also serious enough to implicate the Eighth Amendment when prison officials recklessly cause them through their own intentional conduct. Thus, Plaintiff's pain and eye injury are sufficient to satisfy the objective element of his claim. [2]

Plaintiff has also alleged sufficient facts to satisfy the subjective element of his claim. A reasonable fact-finder could conclude that it is obvious that spraying high-pressure chemicals at eye-level, in the presence of a group of people, poses a serious risk of harm, and that Defendant Brown therefore acted with reckless disregard to the safety of Plaintiff and others when she did so. *See Phelps,* 308 F.3d at 186 (citing *Farmer,* 511 U.S. at 837, 114 S.Ct. at 1979).

***7** Therefore, Plaintiff has adequately pled a claim that Defendant Brown violated his Eighth Amendment rights when she was deliberately indifferent to the significant risk that indiscriminately spraying the fire extinguisher would seriously injure Plaintiff. While the facts may ultimately demonstrate otherwise, at this early stage in this proceeding the claim does not merit dismissal.

B. *Use of Excessive Force*

1. *Legal Standard*

In excessive-force cases, the Eighth Amendment inquiry "turns on whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Wright v. Goord,* 554 F.3d 255, 269 (2d Cir.2009); *see also Wilson,* 501 U.S. at 302, 111 S.Ct. at 2326; *Blyden,* 186 F.3d at 262. The objective element of an excessive-force claim requires only a showing that the force used was more than *de minimis, see Wright,* 554 F.3d at 269; *Walsh,* 194 F.3d at 48, because when force is used maliciously and sadistically to cause harm, "contemporary standards of decency always are violated ... whether or not significant injury is evident." *Hudson,* 503 U.S. at 9, 112 S.Ct. at 1000; *accord Wright,* 554 F.3d at 268–69. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.... Indeed, not even every *malevolent* touch by a prison guard gives rise to a federal cause of action." *Boddie,* 105 F.3d at 862 (internal quotation marks and citations omitted). However, there is no need to demonstrate that a serious injury resulted. "Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." *Hudson,* 503 U.S. at 9, 112 S.Ct. at 1000; *see also Wilkins v. Gaddy,* ––– S.Ct. ––––, No. 08–10914, ––– U.S. ––––, at –––– – ––––, 130 S.Ct. 1175, ––– L.Ed.2d ––––, at –––– – ––––, 2010 WL 596513, at *2–3 (Feb. 22, 2010) (per curiam). [3]

The subjective inquiry in excessive-force cases turns on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Blyden,* 186 F.3d at 262 (quoting *Hudson,* 503 U.S. at 7, 113 S.Ct. at 999). The use of the terms "maliciously and sadistically" is "not a limit on liability for uses of force that are otherwise in bad faith," but rather "only a characterization of all 'bad faith' uses of force." *Id.* at 263 (citing *Hudson,* 503 U.S. at 7, 112 S.Ct. at 999). Therefore, the subjective inquiry considers whether the charged official used force in service of a legitimate penological objective. "Where no legitimate law enforcement or penological purpose can be inferred from the defendant's alleged conduct, the abuse itself may, in some circumstances, be sufficient evidence of a culpable state of mind." *Boddie,* 105 F.3d at 861.

2. *Application*

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It is not possible to conclude, at this early stage, that Defendant Brown's actions involved merely the *de minimis* use of force. As alleged, Brown sprayed a high-pressure stream of chemicals into Plaintiff's face and eye. The combination of the chemicals and the pressure with which they were sprayed was sufficient to cause extreme pain, partial blindness, and may even have risked destroying Plaintiff's eye. That use of force is significant enough to implicate the Constitution. *See Beckford v. Portuondo,* 151 F.Supp.2d 204, 216 (N.D.N.Y.2001) (plaintiff's allegations that he suffered minor injuries when prison guards sprayed him in the face and chest with a fire extinguisher were sufficiently serious to satisfy objective element of Eighth Amendment excessive-force claim); *cf. Wright,* 554 F.3d at 269 ("[W]here a prisoner's allegations and evidentiary proffers could reasonably, if credited, allow a rational factfinder to find that corrections officers used force maliciously and sadistically, our Court has reversed summary dismissals of Eighth Amendment claims of excessive force even where the plaintiff's evidence of injury was slight and the proof of excessive force was weak."). Therefore, Plaintiff satisfies the objective element of an Eighth Amendment excessive force claim.

***8** It is the subjective prong that, at least superficially, poses the greatest obstacle to Plaintiff's excessive-force claim because, even as alleged in the Complaint, Defendant Brown did not maliciously or sadistically spray the extinguisher at *Plaintiff* in order to cause *him* harm. Characterizing the issue in that way, however, does not conclude the inquiry.

The threshold question in the subjective prong of a use-of-force claim is whether force was used in service of a legitimate penological interest. "Infliction of pain that is totally without penological justification is per se malicious." *Ruffino v. Gomez,* No. 3:05 CV 1209(JCH), 2006 WL 3248570, at *6 (D.Conn. Nov.8, 2006) (citing *Hope,* 536 U.S. at 737, 122 S.Ct. at 2514) (internal quotation marks omitted). No legitimate penological purpose can be inferred from Plaintiff's description of Defendant Brown's conduct. When she sprayed the fire extinguisher, there was no fire to be extinguished, and no other apparent security threat. Rather, as alleged, after sexual play, she was angry at an inmate and wanted to punish him. (*See* Am. Compl. ¶¶ 9–11.) *See* Boddie, 105 F.3d at 861 (sexual abuse of inmates serves "no legitimate law enforcement or penological purpose"); *Beckford,* 151 F.Supp.2d at 216 ("when a prison guard applies force against a prisoner that poses no reasonable threat simply because the guard loses his or her temper and wishes to wantonly inflict pain on the prisoner, a per se violation of the Eighth Amendment occurs").

Thus, Plaintiff has satisfied his burden of pleading that Defendant Brown acted in bad faith, because she had no legitimate reason to spray the fire extinguisher at Plaintiff or any other inmate. *See Santiago v. Campisi,* 91 F.Supp.2d 665, 673 (S.D.N.Y.2000) ("plaintiff has satisfied his burden on [the subjective] element by merely pleading a scenario in which the use of force could not have been in good faith.").

Defendants argue that Defendant Brown cannot be liable for an Eighth Amendment violation because she did not intend to use force against *Plaintiff,* and therefore cannot have acted with a sufficiently culpable state of mind. However, the Second Circuit has noted that it is inappropriate to impose a "limit on liability for force that is otherwise in bad faith." *Blyden,* 186 F.3d at 263. While the Second Circuit has not addressed the specific circumstance of one inmate being injured by bad-faith force directed at another, the Ninth Circuit analyzed that exact scenario in *Robins v. Meacham,* 60 F.3d 1436, 1441 (9th Cir.1995), and squarely rejected the argument that Defendants make here.

Robins concerned an incident in which prison officials fired a round of bird shot at an inmate who refused an order to "lock up." Several pellets of bird shot went under the cell door of the bystander plaintiff, injuring his foot. He brought an Eighth Amendment suit against the officers, who argued that they could not be held liable for his injuries, because they had intended to use force only against the non-compliant inmate. The Ninth Circuit disagreed, finding that "[t]he standard of wantonness that a plaintiff must establish is not that the defendants acted *towards him* maliciously and sadistically for the purpose of causing *him* harm," but rather that "the defendants applied force maliciously and sadistically for the very purpose of causing harm-that is *any* harm." *See id.* (emphasis in original).

***9** When a corrections official gratuitously uses force that is "not applied in a good-faith effort to maintain or restore discipline," it is by definition wanton and unconstitutional. *Blyden,* 186 F.3d at 263. Defendants fail to explain why such force would cease to be

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unconstitutional when it injures inmates *in addition to* the official's intended target. Of course, had there been a security justification for Defendant Brown's employing a fire extinguisher against the other inmate, then the use of that force would not have been malicious and wanton, and any consequential injury to Plaintiff could reasonably be viewed as mere negligence. *See Bolden v. O'Leary,* No. 89 C 6230, 1995 WL 340961, at *5 (N.D.Ill. June 2, 1995) (where correctional officer used a chemical agent on an inmate who was approaching him in a threatening manner, in the midst of other inmates refusing to obey direct orders, the plaintiff-inmate's inadvertent exposure to the chemical agent was not actionable under Section 1983). That, however, is not what has been alleged in the Complaint.

The Court recognizes that the facts alleged by Plaintiff do not fit comfortably into the elements of an Eighth Amendment excessive-force claim, because it does not appear that Defendant Brown intended to injure Plaintiff. However, when a correctional official intentionally and wantonly uses force without justification against one inmate, and thereby creates a substantial risk of harm and actual injury to other inmates, it cannot be the case that she is free of constitutional liability to the inmates she injures just because they were not her intended targets. Whether Defendant Brown's conduct is viewed as the wanton and bad faith use of excessive force, or as deliberate indifference to inmate health and safety, the allegations of the Complaint are sufficient to state a plausible violation of the Eighth Amendment.

III. Denial of Medical Care

Plaintiff has alleged that Defendants Brown, Arias, and Waiters were deliberately indifferent to his medical needs when they refused to send him to the prison's clinic immediately after the fire extinguisher incident. Plaintiff claims that Defendant Brown refused his requests for medical care, telling him to "get the fuck away from her" and that she "did not care if [he] died." (*See* Am. Compl. ¶ 14.) When Plaintiff made the same request of Defendant Arias, he responded that he could not do anything to help, because he was "just the Meal Relief Officer." (*See id.*) Defendant Waiters also refused Plaintiff's request for medical care, telling him that she "was not going to get involved because C.O. Brown was the A–Officer." (*See id.* ¶ 16.)

Defendants contend that Plaintiff's injuries were not serious enough to warrant medical attention, and this claim should therefore be dismissed.

A. *Legal Standard*

The objective element of an Eighth Amendment claim arising out of the denial of medical care focuses on whether the alleged deprivation of adequate medical care was "sufficiently serious." *See Salahuddin,* 467 F.3d at 279 (quoting *Farmer,* 511 U.S. at 834, 114 S.Ct. at 1977). Determining whether the care a prisoner received meets the objective standard requires an additional two-part inquiry. *See id.* First, courts focus on the adequacy of the care. *See id.* Under this part of the analysis, "prison officials who act reasonably in response to an inmate-health risk cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 279–80 (quoting *Farmer,* 511 U.S. at 845, 114 S.Ct. at 1983). Second, courts focus on the seriousness of a plaintiff's medical needs. *See id.* at 280. "Factors relevant to the seriousness of a medical condition include whether 'a reasonable doctor or patient would find [it] important and worthy of comment,' whether the condition 'significantly affects an individual's daily activities,' and whether it causes 'chronic and substantial pain.' " *Id.* (quoting *Chance v. Armstrong,* 143 F.3d 698, 702 (2d Cir.1998)); *see also Brock,* 315 F.3d at 162. The inquiry into the seriousness of a medical condition depends on the deprivation of care that the prisoner has alleged. If the prisoner has alleged that the prison failed to treat his condition at all, then courts will consider the severity of the medical condition itself. However, if the alleged violation is a disruption or delay in treatment, then "it's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes." *Smith v. Carpenter,* 316 F.3d 178, 185–86 (2d Cir.2003); *see also Salahuddin,* 467 F.3d at 280.

***10** The subjective element of an Eighth Amendment claim for denial of medical care focuses on whether the defendant acted with "deliberate indifference" to the plaintiff's medical needs. As in conditions-of-confinement cases, the charged official must "act or fail to act while actually aware of a substantial risk that serious inmate harm will result." *Salahuddin,* 467 F.3d at 280 (citing *Farmer* 511 U.S. at 836–37, 114 S.Ct. at 1978); *see also Wilson,* 501 U.S. at 303, 111 S.Ct. at 2327

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("Whether one characterizes the treatment received by the prisoner as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard.") (citations omitted).

B. *Application*

Plaintiff has adequately pled the objective element of his claim. Turning first to the adequacy of care, Plaintiff has alleged that Defendants did not respond reasonably to his request for medical care. The Eighth Amendment "does not require empathy." *Ramos v. Artuz,* No. 00 Civ. 149(LTS)(HBP), 2003 WL 342347, at *9 (S.D.N.Y. Feb. 14, 2003); *see also Verley v. Goord,* No. 02 Civ. 1182(PKC) (DCF), 2004 WL 526740, at *13 (S.D.N.Y. Jan. 23, 2004) (Report and Recommendation). Nor does the mere fact that an official was hostile or verbally abusive to an inmate seeking care give rise to an Eighth Amendment claim. *See Verley,* 2004 WL 526790 at *13; *Johnson v. Bendheim,* No. 00 Civ. 720(JSR)(KNF), 2001 WL 799569, at *6 (S.D.N.Y. July 13, 2001). What is required, however, is that prison officials provide reasonable care. *See Salahuddin,* 467 F.3d at 279–80. Here, Plaintiff contends that Defendants refused to provide him with *any* medical care, and, as alleged, they did not make that decision on the basis of their reasonable judgment about Plaintiff's medical needs.

As to the seriousness of Plaintiff's medical condition, he alleges that he was deprived of care for a period of several hours, until, at the behest of his family, a captain eventually arrived and referred him to the prison's medical clinic. (*See* Am. Compl. ¶ 18.) Plaintiff does not claim that the treatment he received from the medical staff at the clinic was inadequate. (*See* Am. Compl. ¶ ¶ 18–20.) Therefore, the deprivation at issue is the delay in treatment, and it is the seriousness of the risk posed by that delay that is relevant to Plaintiff's Eighth Amendment claim. *See Smith,* 316 F.3d at 186.

At this early stage, drawing all inferences in the Amended Complaint in Plaintiff's favor, the Court cannot conclude that the delay in Plaintiff's medical care was not serious. Considering the three relevant criteria—(1) whether a reasonable doctor or patient would find the condition important and worthy of comment, (2) whether the condition "significantly affects an individual's daily activities," and (3) whether it causes "chronic and substantial pain"—Plaintiff's allegations clearly satisfy (1) and (3), and plausibly fulfill (2). *See Salahuddin,* 467 F.3d at 279–80. The Amended Complaint alleges that Plaintiff was in "extreme pain," and the prison's medical staff clearly thought that his condition was worthy of attention, as evidenced by the x-ray diagnostics, medication, referral to an eye specialist, and hours of medical care they provided once he was eventually brought to the clinic. Plaintiff also alleges the sort of condition that might plausibly "significantly affect" his daily activities: the temporary loss of sight in his left eye.

***11** Defendants argue that Plaintiff was not actually in severe pain, and that his eye was merely "red and irritated," but those sorts of factual disputes are not appropriately considered on a motion to dismiss,[4] where the Court must "take as true all of the allegations contained in plaintiff['s] complaint and draw all inferences in favor of the plaintiff [ ]." *Weixel,* 287 F.3d at 145. Therefore, Plaintiff has adequately pleaded the objective element of his Eighth Amendment claim.

Plaintiff also has adequately pled the subjective element of his claim. He has alleged that the Individual Defendants were aware that he had been sprayed in the face and eye with chemicals from the fire extinguisher, and that he was in pain. (*See* Am. Compl. ¶¶ 12–16.) Moreover, he made a direct request to each of them for medical attention. (*See id.*) Taken together, those allegations are sufficient to state a plausible claim that the Individual Defendants were deliberately indifferent to a substantial risk that Plaintiff would suffer serious harm. Therefore, Plaintiff has adequately pled a denial of medical care that violates the Eighth Amendment.

IV. Claims Against DOC

It is well established that New York City agencies, such as the Department of Correction, are not suable entities. *See* N.Y. City Charter Ch. 17 § 396 ("[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of agency, except where otherwise provided by law"); *see also Marcello v. Dep't of Corr.,* No. 07 Civ. 9665(NRB), 2008 WL 2951917, at *4 (S.D.N.Y. July 30, 2008) (under the New York City Charter, agencies of the City are immune from suit); *Green v. City of N.Y. Dep't of Corr.,* No. 06 Civ. 4978(LTS)(KNF), 2008 WL 2485402, at *4 (S.D.N .Y. June 19, 2008) (dismissing the New York City Department

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of Correction as a defendant because it is a non-suable entity); *Echevarria v. Dep't of Corr. Servs. of N.Y. City,* 48 F.Supp.2d 388, 391 (S.D.N.Y.1999) (holding that the New York City Department of Correction is not a suable entity).[5] Therefore, I recommend that the claims against DOC be dismissed.

CONCLUSION

For the foregoing reasons, the Court recommends that Defendants' motion to dismiss be denied with respect to the claims against the Individual Defendants, and granted as to the claims against DOC.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed.R.Civ.P. 6(a) and (d). Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable George B. Daniels, United States District Judge, and to the chambers of the undersigned, Room 1660. Any requests for an extension of time for filing objections must be directed to Judge Daniels. Failure to file objections will result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn,* 474 U.S. 140, 155, 106 S.Ct. 466, 475, 88 L.Ed.2d 435 (1985); *Frank v. Johnson,* 968 F.2d 298, 300 (2d Cir.1992); *Small v. Sec'y of Health & Human Servs.,* 892 F.2d 15, 16 (2d Cir.1989).

All Citations

Not Reported in F.Supp.2d, 2010 WL 1142066

Footnotes

1. Because Plaintiff was a sentenced inmate in post-conviction detention during the relevant period, his claims are properly analyzed under the Eighth Amendment. *See Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L.Ed.2d 811 (1994); *Helling v. McKinney,* 509 U.S. 25, 31, 113 S.Ct. 2475, 2480, 125 L.Ed.2d 22 (1993); *Whitley v. Albers,* 475 U.S. 312, 327, 106 S.Ct. 1078, 1088, 89 L.Ed.2d 251 (1986).
2. Defendants argue that Plaintiff's medical records indicate that he sustained only eye irritation, redness, and conjunctivitis as a result of the incident, and, therefore, he cannot satisfy the objective prong of an Eighth Amendment claim. (*See* Defs.' Mem. at 8.) The Court need not determine whether such consequences would be serious enough to give rise to an Eighth Amendment violation because the evidence in Plaintiff's medical records is not relevant to a Rule 12(b)(6) motion to dismiss. Here, the Court must accept the allegations of the Complaint as true, and matters outside of the pleadings cannot be considered. This will not be the case if a motion for summary judgment is brought after the parties have an opportunity for pretrial discovery.
3. Nevertheless, the absence of serious injury is relevant to the inquiry into whether the force used was *de minimis,* even though it does not end it. *See Scott v. Coughlin,* 344 F.3d 282, 291 (2d Cir.2003) (citing *Hudson,* 503 U.S. at 7, 112 S.Ct. at 999); *see also Wilkins,* ––– U.S. ––––, at –––– – ––––, 130 S.Ct. 1175, ––– L.Ed.2d ––––, at –––– – ––––, 2010 WL 596513, at *2–3.
4. Defendants have cited several cases in support of their argument that Plaintiff's medical needs were not serious, but all were decided at the summary judgment stage, on the basis of pretrial discovery, which is not appropriate at the motion to dismiss stage. *See Edmonds v. Greiner,* No. 99 Civ. 1681(KNF), 2002 WL 368446, at *12 (S.D.N.Y. Mar.7, 2002) (granting summary judgment to defendants on plaintiff's claim that he was denied medical care overnight after prison guard threw substance in his eyes, and finding that prison guard acted reasonably, relying on evidence that guard had contacted medical staff and informed them of the problem with plaintiff's eyes and been told to have plaintiff flush his own eyes with water and come for an examination the following morning); *Pressley v. Green,* No. 02 Civ. 5261(NRB), 2004 WL 2978279, at *4 (S.D.N.Y. Dec.21, 2004) (granting summary judgment, relying on medical records and doctor's affidavit to determine that a delay of several hours in treating plaintiff's first and second degree burns was not serious, and that there was insufficient evidence that plaintiff had been in severe pain); *Smart v. City of New York,* No. 08 Civ. 2203(HB), 2009 WL 862281, at *7 (S.D.N.Y. Apr.1, 2009) (granting summary judgment, relying on deposition testimony to find that plaintiff, who had been sprayed in the eyes with pepper spray, did not have a serious medical need, because plaintiff's eyes were flushed by a nurse after he had seen a doctor, and doctor would have flushed the eyes himself if condition had been urgent).
5. Plaintiff claims that the fire extinguisher incident was the result of "an unwritten policy in which female correction officers are allowed to play sexual games with inmates." (*See* Am. Compl. ¶ 22.) However, he alleges only a single incident

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involving a single officer, and does not plausibly allege that the "policy" he references was the proximate cause of his injury. While municipal governments can be liable under § 1983 for constitutional violations that are the result of a governmental custom or policy, whether written or unwritten, *see Monell v. Dep't of Soc. Servs. of City of N.Y.,* 436 U.S. 658, 690–91, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978), Plaintiff's claim is implausible on its face. It would therefore be inappropriate to allow Plaintiff to amend his Complaint to add the City of New York as a Defendant in place of DOC.

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United States District Court,
S.D. New York.

Adam WEST, Plaintiff,
v.
CITY OF NEW YORK, C.O. Randal, Defendants.

No. 13 Civ. 5155(PAE).
|
Signed Aug. 28, 2014.

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge.

***1** Adam West, proceeding *pro se* and *in forma pauperis,* sues the City of New York (the "City") and Corrections Officer Ginea Randal, alleging, among other things, that she used excessive force against him. The City, although not Randal, now moves to dismiss. For the following reasons, the City's motion is granted, and the Complaint is dismissed as to the City.

I. Background

A. Factual Background [1]

West is an inmate on Riker's Island. Compl. at 1. On June 27, 2013, Randal refused to allow West to eat or take a shower. *Id.* at 2–3. As a result, another corrections officer put West in the shower around 2 p.m. *Id.* at 3. When Randal learned that West was in the shower, Randal entered the bathroom, spit in West's face, and sprayed him with mace—also known as OC spray or pepper spray—for approximately 15 seconds. *Id.* Randal then left West in the shower for nearly two hours, *id.,* which aggravated the burning from the mace, *id.* at 5. West also had difficulty breathing while attempting to wash off the mace, a problem worsened by his preexisting heart murmur. *Id.* For days afterward, West suffered itching, burning, and skin discoloration on his chest. *Id.* at 3, 5. The prison medical clinic initially instructed West to wash off the mace while in his cell, *id.* at 3, and for two days did not give him medication for his injuries, *id.* at 9 (Personal Injury Claim Form).

On June 28, 2013, the day after the shower incident, corrections officers gave West a "booth visit" even though he had not been caught with any weapons or contraband. *Id.* at 3. From then on, the officers engaged in harassment that included refusing to grant West recreation time, searching West twice a day without cause, making West's visitors wait to see him, and withholding West's mail. *Id.* at 3, 5.

B. Procedural Background

On July 17, 2013, West filed a signed and notarized Personal Injury Claim Form with the City. Compl. at 8–12. The City does not dispute receiving this form.

On July 24, 2013, West filed the Complaint. Dkt. 3. The Complaint does not identify particular causes of action. It consists instead of a narrative of the actions that Randal and other, unidentified corrections officers took against West, and of the injuries that West claims to have suffered. Liberally construed, [2] however, the Complaint can be read to allege five distinct constitutional violations that are potentially actionable under 42 U.S.C § 1983: that (1) Randal used excessive force against West, in violation of the Eighth and Fourteenth Amendments; (2) Randal and other corrections officers failed to furnish West with adequate medical care for his injuries, rising to the level of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments; (3) corrections officers denied West recreation time, in violation of the Eighth and Fourteenth Amendments; (4) the officers searched West without probable cause, in violation of the Fourth and Fourteenth Amendments; and (5) the officers withheld West's mail, depriving him of personal property without due process of law, in violation of the First and Fourteenth Amendments. West seeks $100,000 in damages. Compl. at 5.

***2** The Complaint originally named the New York City Department of Correction ("DOC") and Corrections Officer Randal as defendants. Dkt. 3. On August 2, 2013, the Court dismissed West's claims against the DOC and added the City as a defendant, on the grounds that the agency cannot be sued in its own name. Dkt. 6.

On November 1, 2013, the City filed an Answer to the Complaint, Dkt. 12, and on December 23, 2013, Randal did the same, Dkt. 15. On January 14 and May 13, 2014, the Court appointed limited discovery counsel for both

pro se plaintiff West and *pro se* defendant Randal. Dkt. 18, 27.

On May 30, 2014, the City moved to dismiss, Dkt. 29, and filed an accompanying memorandum of law, Dkt. 31 ("Def.Br."), and declaration, Dkt. 30. The City argues there that the Complaint does not allege an official policy or custom, as required to hold a municipality liable for constitutional violations. Def. Br. 3–4. On July 9, 2014, West filed an affirmation opposing the motion to dismiss. Dkt. 35 ("Pl.Opp.Br."). West stated there, for the first time, that the DOC had failed to properly train Randal and that Randal had been involved in several other incidents before the shower incident. Pl. Br. at 1. On August 6, 2014, the City notified the Court that it would not file a reply memorandum. Dkt. 36. [3]

II. Discussion

A. Applicable Legal Standards

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A claim will only have "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." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A complaint is properly dismissed, where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly,* 550 U.S. at 558. Although a district court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor, *Steginsky v. Xcelera Inc.,* 741 F.3d 365, 368 (2d Cir.2014), that tenet "is inapplicable to legal conclusions," *Iqbal,* 556 U.S. at 678.

Pro se complaints ' "must be construed liberally and interpreted to raise the strongest arguments that they suggest.' " *Sykes,* 723 F.3d at 403 (quoting *Triestman,* 470 F.3d at 474). Courts may not, however, read into *pro se* submissions claims inconsistent with the *pro se* litigant's allegations, *see Phillips v. Girdich,* 408 F.3d 124, 127–28 (2d Cir.2005), or arguments that the submissions themselves do not "suggest," *Walker v. Schult,* 717 F.3d 119, 124 (2d Cir.2013) (citation omitted). *Pro se* status "does not exempt a party from compliance with relevant rules of procedural and substantive law." *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir.1983) (citation omitted).

B. Adequacy of the Pleading of West's Claims

***3** West's claims are brought under § 1983. "Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." *Thomas v. Roach,* 165 F.3d 137, 142 (2d Cir.1999) (citing *City of Okla. City v. Tuttle,* 471 U.S. 808, 816 (1985)). Accordingly, a defendant cannot be held liable under § 1983 absent an "underlying constitutional violation." *Segal v. City of New York,* 459 F.3d 207, 219 (2d Cir.2006).

The Court accordingly must determine whether, as to each of the claims it has construed West to make, the Complaint states a cognizable claim. *See Amato v. City of Saratoga Springs, N.Y.,* 170 F.3d 311, 320 (2d Cir.1999) (citing *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986)) ("[I]if a plaintiff fails to show that a constitutional violation occurred in the suit against the individual official, the corresponding cause of action against the municipality will be mooted since a claim of [municipal liability] is only actionable where some constitutional violation actually occurred"). In addition, because West brings suit against the City, the Court must determine whether the allegations in the Complaint satisfactorily allege municipal liability, to wit, that the plaintiff's injuries derived from an officially adopted policy or custom. *See Monell v. Dep't of Soc. Servs. of the City of N.Y.,* 436 U.S. 658, 694 (1978); *see also Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown,* 520 U.S. 397, 404 (1997) (plaintiff "must demonstrate a direct causal link between the municipal action and the deprivation of federal rights"). The Court here addresses the adequacy of the pleading of West's claims, and addresses in the following section whether West's Complaint comports with *Monell.*

1. Excessive Force

The Court construes West first to allege that Randal used excessive force against him. The " 'unnecessary and wanton infliction of pain' on a prisoner constitutes cruel and unusual punishment in violation of the Eighth Amendment" as incorporated against the states by the Fourteenth Amendment. *Bod die v. Schnieder,* 105 F.3d 857, 861 (2d Cir.1997) (quoting *Whitley v. Albers,* 475 U.S. 312, 319 (1986)). There are two elements of such an Eighth Amendment violation. First, the punishment inflicted

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must have been ' "objectively, sufficiently serious.' " *Id.* (quoting *Farmer v. Brennan,* 511 U.S. 825, 834 (1994)). Second, the corrections officer must have had a ' "sufficiently culpable state of mind.' " *Id.* (quoting *Farmer v. Brennan,* 511 U.S. at 834). A corrections officer violates the Eighth Amendment when force is applied " 'maliciously and sadistically to cause harm' " rather than " 'in a good-faith effort to maintain or restore discipline.' " *Hogan v. Fischer,* 738 F.3d 509, 516 (2d Cir.2013) (quoting *Hudson v. McMillian,* 503 U.S. 1, 6–7 (1992)). If " 'no legitimate law enforcement or penological purpose can be inferred from the defendant's alleged conduct, the abuse itself may ... be sufficient evidence of a culpable state of mind.' " *Id.* (quoting *Boddie,* 105 F.3d at 861).

***4** Here, West alleges that Randal sprayed him with mace for approximately 15 seconds because another corrections officer had allowed him to take a shower. As alleged, the prolonged spraying resulted in difficulty breathing, severe itching and burning, and skin discoloration. These factual allegations adequately plead both elements of an Eighth Amendment claim. First, the punishment inflicted is objectively serious. Although the "immediate discomfort" caused by mace does not typically constitute excessive force, courts in this Circuit have found unnecessary and wanton infliction of pain when a plaintiff alleges "injuries from being sprayed," as West does here. *Brown v. Banks,* No. 06 Civ. 14304(LTS)(HBP), 2008 WL 3833227, at *2 (S.D.N.Y. Aug. 14, 2008) (citation omitted); *see also, e.g., Lewis v. Clarkstown Police Dep't,* No. 11 Civ. 2487(ER), 2014 WL 1364934, at *7 (S.D.N.Y. Mar. 31, 2014); *Cunninham v. New York City,* No. 04 Civ. 10232(LBS), 2007 WL 2743580, at *6–7 (S.D.N.Y. Sept. 18, 2007). Second, the assault, as alleged, lacked any legitimate purpose. Even if West had disobeyed Randal's orders, the use of the artillery of mace, on the facts pled, was unnecessary to restore discipline. In light of this lack of evident justification, West has adequately pled that Randal, in spraying him with mace while he was showering, acted with a sufficiently culpable state of mind. *See, e.g., Hogan,* 738 F.3d at 516 (finding that prison officials had a sufficiently culpable state of mind where they approached plaintiff's cell "for the sole purpose of assaulting him with feces, vinegar, and oil"). The Complaint therefore adequately alleges an Eighth Amendment violation based on Randal's use of excessive force.

2. Inadequate Medical Care

The Court construes West to allege deliberate indifference to his serious medical needs, an independent violation of the Eighth and Fourteenth Amendments. To establish such a claim, West must satisfy two requirements: "The first requirement is objective: the alleged deprivation of adequate medical care must be 'sufficiently serious.' " *Salahuddin v. Goord,* 467 F.3d 263, 279 (2d Cir.2006) (quoting *Wilson v. Setter,* 501 U.S. 294, 298 (1991)). "The second requirement ... is subjective: the charged official must act with a sufficiently culpable state of mind." *Id.* at 280 (citing *Wilson,* 501 U.S. at 300).

In general, "delay in medical treatment by itself cannot violate the Eighth Amendment." *Arnold v. Westchester Cnty.,* No. 09 Civ. 3727(JSR)(GWG), 2012 WL 336129, at *13 (S.D.N.Y. Feb. 3, 2012) (collecting cases). However, "[a]n intentional delay in necessary medical care, amounting in effect to a form of punishment, is actionable." *Id.* (citation omitted); *see also, e.g., Estelle v. Gamble,* 429 U.S. 97, 104–05 (1976) (Eighth Amendment is violated "by prison guards in intentionally denying or delaying access to medical care"); *Archer v. Dutcher,* 733 F.2d 14, 16 (2d Cir.1984) ("[I]f defendants did decide to delay emergency medical aid—even for 'only' five hours—in order to make [plaintiff] suffer, surely a claim would be stated under *Estelle"*); *Laster v. Mancini,* No. 07 Civ. 8265(DAB), 2013 WL 5405468, at *21 (S.D.N.Y. Sept. 25, 2013) ("Courts have declined to dismiss deliberate-indifference claims as a matter of law where plaintiffs have alleged a delay in medical treatment causing substantial pain, even when the injuries alleged were not life-threatening and the delay was relatively brief.").

***5** The facts pled here are sufficient to support a finding of deliberate indifference. West alleges that after Randal sprayed him with mace, she and other corrections officers left him in the shower for approximately two hours. During this time, West was coughing and struggling to breathe; his skin was burning; and he may have been suffering complications related to his preexisting heart murmur. Although the Complaint acknowledges that West received medical attention that day and again two days later, the two-hour delay plausibly satisfies both elements of the Eighth Amendment inquiry: First, objectively, the delay caused West substantial pain. *See Brock v. Wright,* 315 F.3d 158, 163 (2d Cir.2003) ("[W]e have long held that 'the Eighth Amendment forbids not only deprivations of medical care that produce physical

torture and lingering death, but also less serious denials which cause or perpetuate pain.' ") (quoting *Todaro v. Ward,* 565 F.2d 48, 52 (2d Cir.1977)). Second, as pled, the motivation for the delay was punitive. West alleges that Randal delayed his access to medical care for the sole purpose of extending his suffering. *See Archer,* 733 F.2d at 16. Such conduct is fairly argued to be "repugnant to the conscience of mankind," *Estelle,* 429 U.S. at 105 (citations omitted), and is consistent with a sufficiently culpable state of mind. The Complaint therefore states a plausible claim of deliberate indifference to West's serious medical needs, in violation of the Eighth and Fourteenth Amendments.

3. Recreation Time

The Complaint further alleges that, after the shower incident, the corrections officers denied West recreation time. Courts have recognized that "exercise is one of the basic human needs protected by the Eighth Amendment," and so " 'some opportunity to exercise must be afforded to prisoners.' " *Williams v. Goord,* 142 F.Supp.2d 416, 428 (S.D.N.Y.2001) (quoting *Williams v. Greifinger,* 97 F.3d 699, 704 (2d Cir.1996)). "Denial of a prisoner's recreation privileges for an extended period of time violates the Eighth Amendment if the denial results in a deprivation 'of the minimal civilized measure of life's necessities' and the defendants act with a sufficiently culpable state of mind amounting to deliberate indifference to a serious need." *Beckford v. Portundo,* 151 F.Supp.2d 204, 213 (N.D.N.Y.2001) (quoting *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981)). However, under this standard, courts have found Eighth Amendment violations based on denials of recreation only in extreme circumstances-for instance, when an inmate was denied "all meaningful opportunity for exercise" for three-and-a-half years. *See Jolly v. Coughlin,* 76 F.3d 468, 480 (2d Cir.1996) (citation omitted); *see also Davidson v. Coughlin,* 968 F.Supp. 121, 129 (S.D.N.Y.1997) (collecting cases).

The sparse facts alleged here fall short of that standard. The Complaint does not allege "the duration of the deprivation," "the extent of the deprivation," "the availability of other out-of-cell activities," or "the opportunity for in-cell exercise." *Davidson,* 968 F.Supp. at 130; *see also Williams,* 142 F.Supp.2d at 425. Significantly, the Eighth Amendment "stands as a barrier against fundamental and shocking indecency to those whom the state has chosen to confine for their crimes," but it does not require any particular form of recreational privileges. *Anderson v. Coughlin,* 757 F.2d 33, 36 (2d Cir.1985). Absent specific factual pleadings that demonstrate deprivations on such a scale, the allegations in the Complaint regarding West's recreation do not establish a constitutional violation.

4. Unjustified Searches

***6** The Court has also construed West to claim that, after the shower incident, he was subjected to an unjustified "booth visit" and unjustified twice-daily searches. It is well-established, however, "that prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells." *Hudson v. Palmer,* 468 U.S. 517, 530 (1984). As such, inmates do not have the right to be free from searches of any kind; even searches conducted "solely for harassment" do not implicate the Fourth Amendment. *Willis v. Artuz,* 301 F.3d 65, 68 (2d Cir.2002) (citing *Hudson,* 486 U.S. at 526); *see also, e.g., Rodriguez v. McClenning,* 399 F.Supp.2d 228, 239 (S.D.N.Y.2005) ("[Defendant] correctly asserts that [plaintiff] had no constitutional right to be free from cell searches of any kind, including retaliatory cell searches."); *Salahuddin v. Mead,* No. 95 Civ. 8581(MBM), 2002 WL 1968329, at *5 (S.D.N.Y. Aug. 26, 2002) (collecting cases holding that even "arbitrary" or "retaliatory" searches in prisons do not implicate constitutional rights). Rather, unjustified searches of an inmate's person or prison cell violate the Constitution only when the searches harm the inmate so severely as to constitute cruel and unusual punishment within the meaning of the Eighth Amendment. *See Harris v. Fischer,* No. 11 Civ. 6260(CM)(JLC), 2014 WL 3859242, at *18 (S.D.N.Y. Aug. 1, 2014). Here, the Complaint alleges only that the searches were "annoy[ing]" and sometimes required waking West up in the morning or afternoon. Compl. at 5. Such facts, without more, do not establish a constitutional violation.

5. Withheld Mail

West's final allegation is that corrections officers failed to deliver his mail—specifically, mail sent by West's family—for several weeks. The Court construes this claim to allege both a deprivation of personal property without due process of law in violation of the Fourteenth Amendment, and an act of interference with West's mail in violation of the First and Fourteenth Amendments. The facts alleged fail to make out a cognizable claim under either theory.

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As to the due process claim, even "an unauthorized intentional deprivation" of property does not give rise to a constitutional claim if "adequate state post-deprivation remedies are available." *Hudson,* 468 U.S. at 533. Failure to pursue an available state remedy precludes relief under § 1983. *See Davis v. New York,* 311 F. App'x 397, 400 (2d Cir.2009) (summary order). "New York in fact affords an adequate post-deprivation remedy in the form of, *inter alia,* a Court of Claims action pursuant to N.Y. Comp.Codes R. & Regs. tit. 7, § 1700.3(b)(4)." *Id.* (citing *Jackson v. Burke,* 256 F.3d 93, 96 (2d Cir.2001) (per curiam); *Love v. Coughlin,* 714 F.2d 207, 208–09 (2d Cir.1983) (per curiam)). Accordingly, even accepting the facts alleged in the Complaint as true, the deprivation of West's property interest in his mail is not a cognizable constitutional injury.

***7** Alternatively, the First Amendment protects "a prisoner's right to the free flow of incoming and outgoing mail." *Davis v. Goord,* 320 F.3d 346, 351 (2d Cir.2003); *see also Davidson v. Scully,* 694 F.2d 50, 53 (2d Cir.1982) ("The state's evanescent security interests defended here hardly justify infringement of so basic a right as the right to receive and send mail.") (citation omitted). In general, courts "afford[ ] greater protection to legal mail than to non-legal mail, as well as greater protection to outgoing mail than to incoming mail." *Davis,* 320 F.3d at 351. To date "the Second Circuit has not articulated the contours of the test for *non-legal* mail." *Harris,* 2014 WL 3859242, at *24. But even in the context of legal mail, which merits heightened protection, "an isolated incident of mail tampering is usually insufficient to establish a constitutional violation." *Davis,* 320 F.3d at 351 (citing *Morgan v. Montanye,* 516 F.2d 1367, 1371 (2d Cir.1975); *Washington v. James,* 782 F.2d 1134, 1139 (2d Cir.1986)). Instead, a plaintiff must prove that corrections officers "regularly and unjustifiably interfered" with his mail. *Id.* (citations omitted). Where an inmate alleges only a few instances of mail tampering, he must further allege invidious intent or actual harm. *Id.* (collecting cases).

The sparse allegations in the Complaint fall short of this standard. West does not allege how many times the corrections officers withheld mail from his family, whether the mail was stolen or merely delayed, whether the officers withheld his outgoing mail or incoming mail from other senders, or whether the interference with his mail caused him concrete harm. Accordingly, the Complaint alleges no more than isolated incidents of error or malfeasance, which, as noted, do not constitute First or Fourteenth Amendment violations actionable under § 1983.

C. Adequacy of West's Pleading of Municipal Liability

For the reasons noted, the Complaint plausibly alleges two constitutional violations by Randal: (1) the use of excessive force when she sprayed West with mace without any justification, and (2) deliberate indifference to West's serious medical needs when she failed to procure medical attention for West for at least two hours. The City, however, moves to dismiss these claims against it, on the grounds that West has not pled facts under which it can be held liable for Randal's acts.

Under § 1983, municipalities are not vicariously liable for their employees' actions. *Connick v. Thompson,* 131 S.Ct. 1350, 1359 (2011). To state a claim against a municipality, the plaintiff must allege that an officially adopted policy or custom caused his injury. *See Monell, supra; Bryan Cnty., supra.* A single incident is "not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Okla. City,* 471 U.S. at 823–24; *see also Trevino v. Gates,* 99 F.3d 911, 918 (9th Cir.1996), *cert. denied,* 520 U.S. 1117 (1997) (municipal liability cannot be "predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy"). That West is *pro se* does not relieve him of the duty to adequately plead the elements of a municipal liability claim. *See Costello v. City of Burlington,* 632 F.3d 41, 49 (2d Cir.2011) (affirming dismissal of *pro se* plaintiff's *Monell* claim where "the complaint does not allege facts sufficient to show that 'the violation of his constitutional rights resulted from a municipal custom or policy' ") (quoting *DeCarlo v.. Fry,* 141 F.3d 56, 61 (2d Cir.1998)).

***8** Here, the Complaint falls far short of what *Monell* and its progeny require. It does not, in any way, allege or even suggest "that there was a persistent and widespread unconstitutional governmental policy or custom," that a City "policymaker approved any constitutional violation," or that the City's "failure to train its employees amounted to deliberate indifference to constitutional rights." *Carter v. Inc. Vill. of Ocean Beach,*

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No. 13 Civ. 815, 2014 WL 3561247, at *4 (2d Cir. July 21, 2014).

In his opposition to the City's motion to dismiss, West contends for the first time that the DOC "failed to give [Randal] the proper training for her job" and that Randal had "been in several harassment incidents in the past." Pl. Opp. Br. at 1. However, even if construed as part of the Complaint, these vague and conclusory statements, taken as true, would not establish municipal liability. To state a *Monell* claim premised on failure to train, a plaintiff must allege "[a] pattern of similar constitutional violations by untrained employees" that amounts to "deliberate indifference." *Connick,* 131 S.Ct. at 1360. The pattern must be so widespread as to put policymakers "on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights." *Id.* West's submissions neither detail a pattern of prior bad acts by Randal nor identify a deficiency in the City's training program. Accordingly, West's claims against the City must be dismissed.

III. Next Steps

For the reasons stated above, the Court dismisses all claims against the City based on the Complaint's failure to plead municipal liability, and also *sua sponte* dismisses the Complaint's claims against Randal of constitutional violations with respect to elimination of recreation time, unjustified searches, and withheld mail. However, the Complaint's claims against Randal of excessive force and of deliberate indifference to medical needs, each construed as brought under the Eighth and Fourteenth Amendments, survive.

A *pro se* litigant should be afforded at least one opportunity to amend his complaint if "a liberal reading of the complaint gives any indication that a valid claim might be stated." *Grullon v. City of New Haven,* 720 F.3d 133, 139 (2d Cir.2013) (citations omitted). The Court ought not dismiss a complaint for failure to state a claim unless it "can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." *Gomez v. USAA Federal Savings Bank,* 171 F.3d 794, 796 (2d Cir.1999) (per curiam). Particularly where a *pro se* litigant brings a civil rights action, he should be afforded leave to amend his complaint "fairly freely." *Bobal v. Rensselaer Polytechnic Inst.,* 916 F.2d 759, 763 (2d Cir.1990) (citations omitted).

The Court will afford West this opportunity. West has been engaged in discovery with the aid of limited pro bono counsel for several months but has not yet amended his Complaint. Given leave to amend, it is conceivable that West will be able to fortify his factual allegations so as to (1) plead viable claims regarding loss of recreation time, unjustified searches, and deprivation of mail, and/or (2) satisfy the requirements of *Monell* and state a claim against the City. The Court will afford West 45 days from the date of this decision in which to do so. West is advised not to expect a further opportunity to amend his Complaint.

CONCLUSION

***9** For the foregoing reasons, the Court dismisses without prejudice West's claims against the City, and his claims against Randal with respect with to loss of recreation time, unjustified searches, and deprivation of mail. The Court grants West leave to file an amended complaint. Any such Complaint must be filed by October 13, 2014. Failure to file an amended complaint by that date, absent leave of the Court, will result in the Court's converting this dismissal of claims without prejudice into a dismissal with prejudice.

The Clerk of Court is respectfully directed to terminate the motion pending at docket number 29 and to serve this Opinion and Order on West at his address of record.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 4290813

Footnotes

1 The Court assumes all facts pled in the Complaint and personal injury claim form, Dkt. 3 ("Compl."), to be true, drawing all reasonable inferences in the plaintiff's favor. *See Koch v. Christie's Int'l PLC,* 699 F.3d 141, 145 (2d Cir.2012).

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2 The Court is obligated to construe *pro se* complaints " 'to raise the strongest arguments they suggest.' " *Sykes v. Bank of Am.,* 723 F.3d 399, 403 (2d Cir.2013) (quoting *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474 (2d Cir.2006)).

3 Although Randal sent a letter requesting to file a motion to dismiss on December 23, 2013, Dkt. 14, she never filed such a motion. The deadline for moving for judgment on the pleadings was May 30, 2014. *See* Dkt. 24.

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