COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1243

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

NATHAN GILLIS,

PLAINTIFF-APPELLANT,

V.

GARY MCCAUGHTRY, MR. WEGNER,
MS. PORTER, AND SGT. TARR,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dodge County: JOSEPH E. SCHULTZ, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Nathan Gillis appeals from an order dismissing his multi-claim action against certain prison officials for allegedly violating his constitutional rights. He maintains that the circuit court erred by using summary

judgment methodology to resolve the prison officials' motion to dismiss, and that he alleged sufficient facts to entitle him to a trial. We conclude that the trial court properly dismissed Gillis's Eighth Amendment cause of action for failure to state a claim and properly used summary judgment methodology to dismiss his cause of action for failure to comply with the notice of claim statute. However, we also conclude that Gillis has adequately stated a retaliation claim under the First and/or Fourteenth Amendments. We therefore affirm in part and reverse in part, and remand for further proceedings on the retaliation claim.

BACKGROUND

Gillis alleges that, on July 23, 1997, Sergeant David Tarr of the Waupun Correctional Institution (WCI) treated him more roughly than necessary after he had filed a certiorari petition in circuit court.[1] Gillis alleges that when Tarr came to take him to the showers that day, he handcuffed him so hard that he broke the skin on Gillis's wrists, constricted the security belt around his chest so tightly that Gillis had difficulty breathing, and dug his fingernails into Gillis's arm as he escorted him to the showers. Tarr smiled in response to Gillis's complaints and told him to close his mouth if he wanted a shower. Then, while Gillis was showering, Tarr told him that he had no problem with his certiorari petition because, "niggers don't win around here anyway," and that Gillis "would have hell around here from now on." Gillis further alleges that he repeatedly, but unsuccessfully, complained to the warden and other prison officials about the situation with Tarr, which seemed to him "to be getting worse." Based upon his allegations, Gillis claimed that he was entitled to declaratory, injunctive and

[1] In supplemental briefing ordered by this court, Gillis clarified that his petition sought certiorari review of a prison disciplinary action based upon Tarr's conduct report.

monetary relief under 42 U.S.C. § 1983 for the violation of his First, Eighth and Fourteenth Amendment rights, as well as for the violation of unspecified "state laws of conversion."

Although the named WCI officials disputed Gillis's account, they maintained that, even if true, Tarr's conduct fell short of cruel and unusual punishment. They moved to dismiss the complaint for failure to state a claim. They attached an affidavit to their motion which stated that the attorney general's office had not received a notice of claim regarding Gillis's allegations, and suggested that summary judgment might therefore be appropriate. Gillis filed a brief in opposition to the motion to dismiss, but did not provide any documentation to refute the State's evidence that he had failed to file a notice of claim. The trial court agreed that Tarr's alleged conduct did not constitute cruel and unusual punishment and dismissed all of Gillis's federal claims on that ground, without discussing his additional assertion that his First and Fourteenth Amendment rights had been violated. On the basis of the State's unrefuted affidavit, the trial court also dismissed Gillis's state law claim.

STANDARD OF REVIEW

Section 802.06(3), STATS., provides that a motion to dismiss shall be treated as a motion for summary judgment when the trial court considers matters outside of the pleadings. It is well established that this court applies the same summary judgment methodology as that employed by the circuit court. *See* ***State v. Dunn***, 213 Wis.2d 363, 368, 570 N.W.2d 614, 616 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *See* ***id***.

To determine whether a complaint states a claim upon which relief can be granted, we take the facts pled as admitted and draw all inferences in favor of the party against whom the motion is brought. *See* ***Town of Eagle v. Christensen***, 191 Wis.2d 301, 311, 529 N.W.2d 245, 249 (Ct. App. 1995). We will liberally construe the pleadings and will only dismiss a claim if the plaintiff cannot recover under any circumstances. *See* ***Evans v. Cameron***, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985).

If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. *See* ***Dunn***, 213 Wis.2d at 368, 570 N.W.2d at 617. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. *See* ***id***.

ANALYSIS

1. *Trial Court's Methodology*

Gillis claims that the trial court granted a *sua sponte* summary judgment against him without giving him an opportunity to respond. However, the record does not support his assertion. First of all, the trial court analyzed and dismissed Gillis's federal claims purely on the basis of the sufficiency of the complaint. Given the fact that Gillis filed a response brief in opposition to the State's motion to dismiss, his claim that he lacked notice of that motion is completely without merit. The trial court considered matters outside of the pleadings only with respect to the notice of claim requirement for the state law claim. Since the State's affidavit regarding the notice of claim issue was attached to its motion to dismiss, and since the State's brief in support of its motion

suggested that it would be proper to treat its motion as one for summary judgment if the court accepted its affidavit, Gillis was placed on notice that he needed to rebut the affidavit in order to maintain his state law claim. The trial court used the proper methodology to resolve the State's motion.

2. *Eighth and Fourteenth Amendments Claim*

Gillis claims that Tarr's treatment of him constituted cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments of the United States Constitution. Cruel and unusual punishment encompasses the unnecessary and wanton infliction of pain by prison guards. *See* ***Whitley v. Albers***, 475 U.S. 312, 319 (1986). The test for determining whether a guard's use of physical force was necessary or excessive is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." ***Hudson v. McMillian***, 503 U.S. 1, 6 (1992). The malicious and sadistic use of force to cause harm may violate the Eighth Amendment whether or not the prisoner suffers a significant injury as a result. *See* ***id.*** at 9. The *de minimus* use of force is excluded from constitutional recognition, however, when the sort of force used is not "repugnant to the conscience of mankind." ***Id.*** at 9-10.

Here, we need not determine whether Tarr's use of force was "malicious," because we conclude that the overly tight placement of restraints and a rough grasp on a prisoner's arm are *de minimus* contacts which are not sufficiently repugnant to the conscience of mankind to warrant constitutional attention. Similarly, it is well established that mere words, even such offensive ones as racial slurs or threats, do not rise to the level of cruel and unusual punishment. *See* ***Patton v. Przybylski***, 822 F.2d 697, 700 (7th Cir. 1987). If Tarr's conduct was not cruel and unusual in the constitutional sense, then neither

was the conduct of any of the other WCI officials who allegedly allowed it to occur or failed to remedy it. Therefore, the trial court properly dismissed Gillis's Eighth and Fourteenth Amendments claim against all of the defendants.

3. *First and Fourteenth Amendments Claim*

Although neither the respondents' motion to dismiss nor the trial court's opinion addressed the issue, Gillis also cited the First and Fourteenth Amendments as a basis for relief in his complaint. Because our standard of review requires us to consider any set of facts under which the plaintiff could prevail, we asked the parties to brief whether Gillis had stated a retaliatory treatment claim under either of these amendments.

An act in retaliation for the exercise of a constitutionally protected right is actionable under 42 U.S.C. § 1983 even if the act, when taken for a different reason, would have been proper.[2] *See* ***Black v. Lane***, 22 F.3d 1395, 1402-03 (7th Cir. 1994). The parties do not dispute that a prisoner has a constitutional right to file a certiorari action seeking redress of grievances.[3] The issue is whether Gillis has alleged facts from which we may reasonably infer that Tarr's treatment of him was triggered by his filing of a certiorari petition.

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[2] There seems to be some confusion in the case law as to whether the source of a retaliation claim is the Fourteenth Amendment, or the more specific provision whose exercise allegedly triggered the retaliatory treatment, or both. *See, e.g.,* ***Williams v. Lane***, 851 F.2d 867, 878 (7th Cir. 1988) (citing the Fourteenth Amendment); ***Buise v. Hudkins***, 584 F.2d 223, 229 (7th Cir. 1978) (citing the First Amendment); and ***Crowder v. Lash***, 687 F.2d 996, 1004 n.6 (7th Cir. 1982) (citing the First and Fourteenth Amendments). Resolution of this question is not necessary to the resolution of this appeal, however.

[3] The First Amendment of the United States Constitution protects the rights of citizens to "petition the Government for a redress of grievances." In conjunction with the Fourteenth Amendment's guarantee of due process, the right to petition for redress of grievances requires that state prison inmates be given meaningful access to the courts. *See* ***Crowder***, 687 F.2d at 1004 n.6.

The respondents first argue that merely alleging the ultimate fact of retaliation is insufficient, and that Gillis has not set forth facts sufficient to explain who is supposedly retaliating for what. However, we note that Gillis does not even use the word "retaliation" in his complaint. Therefore, if the complaint does state a claim for retaliation, it is only because it may be inferred from the sequence of events that Tarr treated Gillis unfavorably because Gillis had filed a certiorari action, and not because Gillis has alleged retaliation in conclusory terms.

The respondents cite several cases in support of their contention that the complaint lacks the requisite specificity to state a retaliation claim. In ***Benson v. Cady***, 761 F.2d 335 (7th Cir. 1985), the Seventh Circuit concluded that a complaint drafted by counsel that alleged that a prisoner had been transferred to a double cell some five months after he had filed a lawsuit against prison officials was insufficient to state a retaliation claim. *See* ***id.*** at 342. The court concluded that the lengthy delay between the two incidents undermined the inference of retaliation, although it noted that the complaint might nonetheless have been sufficient under the standard of review for *pro se* complaints. *See* ***id.*** Here, we have a *pro se* complainant and no apparent delay.

In ***Cain v. Lane***, 857 F.2d 1139 (7th Cir. 1988), despite the language quoted by the respondents regarding the need to set forth a chronology of events, the Seventh Circuit concluded that a prisoner's allegation that he had been subjected to cruel and unusual punishment by harassment following his attempts to effect change in the institution *did* state a claim for retaliation, even if it did not state an Eighth Amendment claim. *See* ***id.*** at 1143. The allegations of harassment in Cane's complaint are similar to the allegations here.

Finally, in ***Luedtke v. Gudmanson***, 971 F. Supp. 1263 (E.D. Wis. 1997), a federal district court concluded that a prisoner's allegation that he had been denied vocational training as a punishment for filing complaints was insufficient to state a claim because it failed to specify *who* had denied him training in retaliation for *which* of his many complaints. Here, Gillis has made quite clear who it is he believes has mistreated him. True, Gillis does not give any details about the nature of his certiorari action in his complaint. However, unlike the prisoner in ***Luedtke***, Gillis alleges that the guard made specific reference to his certiorari action. Therefore, we are not persuaded that any of the cases cited by the respondents compel dismissal of the complaint.

The respondents also argue that the complaint is insufficient to state a retaliation claim, because it does not allege that Tarr should have known that his treatment of Gillis would violate his constitutional rights.[4] The question of what a reasonable official should have known, however, goes to the question of qualified immunity. Qualified immunity is an affirmative defense. *See* ***Harlow v. Fitzgerald***, 457 U.S. 800, 815 (1982). It does not figure into our analysis of whether the complaint has stated a claim.

In short, Tarr's vague threats and rough treatment of Gillis could constitute a § 1983 violation if they were expressly motivated by a desire to obstruct or punish the exercise of Gillis's legal right to have court access and meet the other requirements of a § 1983 action. *See* ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis.2d 458, 472, 565 N.W.2d 521, 529-30 (1997). It would be

[4] We also note that the cases cited by the respondents go to whether Tarr should have known that his conduct constituted cruel and unusual punishment, and not whether it constituted retaliatory treatment.

reasonable to infer from Tarr's reference to the certiorari petition and his comment that Gillis "would have hell around here from now on," that Tarr's accompanying conduct was intended to impress upon Gillis that his filing of a certiorari petition would result in harsher treatment in prison.[5] We therefore conclude that the complaint raises at least one set of facts that would entitle Gillis to relief, and the trial court erred when it dismissed the First and Fourteenth Amendments claim without giving Gillis an opportunity to develop the factual basis for it. We will remand to allow the action to proceed on that cause of action against Tarr, although we agree that McCaughtry, Wegner and Porter were all properly dismissed from the suit on the grounds that they were not personally involved in the challenged conduct. *See* ***Wolf-Lillie v. Sonquist***, 699 F.2d 864, 869 (7th Cir. 1983).

4. *State Law Claims*

Although Gillis expressly states that his complaint is based upon 42 U.S.C. § 1983, the complaint might also be liberally construed as attempting to raise one or more state law claims. Because WCI officials are employees of the State of Wisconsin, however, any civil claims against them are subject to § 893.82, STATS. That section requires that a claimant serve upon the attorney general notice of an alleged injury within 120 days of its occurrence. Gillis did not allege compliance with this requirement, and the State's affidavit showing that

[5] We do not suggest that retaliation is the only motive which could be inferred from the guard's alleged conduct. Prison officials are to be accorded considerable deference in their choice of conduct designed to advance legitimate penological objectives. *See* ***Babcock v. White***, 102 F.3d 267, 275 (7th Cir. 1996). Therefore, in order to prove his retaliation claim at trial, Gillis would need to show, not only that the challenged conduct was motivated by the plaintiff's exercise of a First Amendment right, but also that "events would have transpired differently absent the retaliatory motive." ***Id.***

the attorney general's office never received a notice of claim leaves no material fact in dispute for any state law claim.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.