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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GIOVANNI LEYVA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 15-2093-SLD**
	)	
	)	
KANKAKEE COUNTY, *et al.*,	)	
	)	
Defendants.	)	

ORDER

This cause is before the Court on Defendants' motion for summary judgment. As explained more fully below, Defendants are entitled to the summary judgment that they seek.

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Ruiz-Rivera v. Moyer*, 70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 294 (7th Cir. 1997). "[A] party moving for summary judgment can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993). "As with any summary judgment motion, we review cross-motions for summary judgment construing all facts,

and drawing all reasonable inferences from those facts, in favor of the nonmoving party." *Laskin v. Siegel,* 728 F.3d 7314, 734 (7th Cir. 2013) (internal quotation marks omitted).

Accordingly, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue; he must do more than simply show that there is some metaphysical doubt as to the material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 261 (Brennan, J., dissenting) (1986)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.,* 191 F.3d 813, 818 (7th Cir. 1999). Finally, a scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 252.

The basic facts of this case are relatively simple. On November 5, 2012, Leyva was a pretrial detainee at the Jerome Combs Detention Center ("Jerome Combs") in Kankakee, Illinois. Leyva wanted to go to the gymnasium, but Officer Roberts refused his request. Leyva, then, became belligerent and met Officer's Roberts' "aggression with aggression." Officer Roberts instructed Leyva to "lockup," but Leyva refused. Officer Roberts summoned for backup and instructed the other inmates on the Pod to lockup. The other inmates complied, but Leyva did not. Leyva repeatedly refused to comply with the officers' orders.

At the end of the confrontation, Officer Matthews placed his foot on Leyva's back while pointing a taser at Leyva. Leyva claims that Officer Matthews stomped on his back, causing his head to hit the ground. Leyva further claims that Officer Matthews slapped him twice while transporting him to the segregation cell. Leyva asserts that Sgt. Schloendorf witnessed Officer Matthews' assault on him but did nothing to stop the assault or to assist Leyva.

Once at the segregation cell, Leyva flooded the cell, causing about an inch of water to go into the cell and into the nearby day room. Leyva was held in the segregation cell for thirty-six (36) hours. During this thirty-six (36) hours, Sgt. Schloendorf turned the water off to Leyva's cell so that the cell could be cleaned and sanitized after the flooding and so that Leyva would not flood the cell again.

Plaintiff Giovanni Leyva filed this suit under 42 U.S.C. § 1983 alleging that Defendants violated his constitutional rights. After conducting a merit review of Leyva's Complaint, the Court found that Leyva's Complaint stated four claims: (1) a claim for excessive force against Defendant John Matthews (a correctional officer at Jerome Combs) for slapping Leyva, hitting him, and kicking him in the back without justification; (2) a claim against Defendant Todd Schloendorf (a sergeant at Jerome Combs) for failing to protect him from Matthews' attack; (3) a claim against Sgt. Schloendorf for cruel and unusual punishment for placing him in a frigid cell without running water and that was feces smeared; and (4) a claim under Illinois law against the County of Kankakee and Kankakee County Sheriff Timothy Bukowski for failure to train. Defendants have now moved for summary judgment on each of Leyva's claims.

Leyva has offered no evidence with which to create a genuine issue of material fact that Defendants violated his Constitutional rights. The Court sent a notice to Leyva regarding Defendants' motion for summary judgment informing him of the consequences for failing to respond to the motion. In addition, the Court gave Leyva additional time, at his request, to respond to Defendants' motion for summary judgment. Nevertheless, Leyva failed to response.

Despite Leyva's failure to respond, the Court is cognizant that "[s]ummary judgment cannot be granted by default even if there is a complete failure to respond to the motion." *Boyd v. Habeck*, 2013 WL 518966, * 1 (E.D. Wis. Feb. 12, 2013)(citing Fed. R. Civ. Pro. 56(e) advisory

committee note to 2010 amendments). Accordingly, the Court has reviewed the evidence submitted by Defendants, including Leyva's deposition testimony, in order to determine whether a genuine issue of material fact exists that would preclude summary judgment in their favor. The Court finds that no such disputed fact exists and that Defendants are entitled to judgment as a matter of law. *Abbot v. Gale*, 896 F.2d 323, 326 (8th Cir. 1990)(holding that where a defendant denies the allegations of the complaint and a plaintiff then fails "to respond with evidence in support of [her] claim," the court is justified in granting summary judgment.).

Leyva's claim against Officer Matthew fails because the undisputed evidence is clear that Officer Matthews did not exert unconstitutional force against Leyva. The United States Supreme Court has recently held that the Fourth Amendment standard applies to excessive force claims brought by a pre-trial detainee. *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015); *Anderson v. Rock County Jail Med. Staff*, 2015 WL 9028040, * 2 (W.D. Wis. Dec. 15, 2015). Specifically, the Supreme Court held in *Kingsley* "that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable and that no showing regarding the defendant's state of mind is required." *Kingsley*, 135 S. Ct. at 2473. The "objective reasonableness turns on the 'facts and circumstances of each particular case.'" *Id*. (quoting *Graham v.* Connor, 490 U.S. 386, 396 (1989). "A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id*.

In addition, "[a] court must also account for the 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices that in th[e] judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'" *Id.* (quoting *Bell v. Wolfish*,

441 U.S. 520, 540 (1979)). The Supreme Court further instructed that "[c]onsiderations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Id.*

Here, the undisputed evidence shows that the officers on the scene, including Officer Matthews, repeatedly instructed Leyva to lock up and to get face first on the ground. Leyva acknowledges that he repeatedly refused these instructions and that he acted with hostility towards the officers. Correctional officers must be allowed to maintain order and discipline in a prison environment. *Bell*, 441 U.S. at 546. A prisoner or a detainee must not be allowed to dictate which commands he will and will not follow. *Soto v. Dickey*, 744 F.2d 1260, 1267 (7th Cir. 1984). The minimal force that Officer Matthews employed was in response to Leyva's refusal to obey lawful commands. As such, Officer Matthews' actions do not rise to the level of excessive force. *Jordan v. Anderson*, 2011 WL 2516928, * 3 (C.D. Ill. June 24, 2011); *Lebron v. Wright*, 2005 WL 731058, * 8 (N.D. Ill. Mar. 29, 2005).

Furthermore, "[t]here is an ancient maxim, *de minimis non curat lex*, 'the law cares not for trifles.'" *Fountain v. Shaw*, 2011 WL 4888874, * 7 (N.D. Ill. Oct. 13, 2011)(quoting *Ehrlich v. Mantzke*, 2002 WL 265177, * 4 (N.D. Ill. Feb. 25, 2002)). "The Constitution does not concern itself with *de minimis* matters." *Id.*

Although Leyva testified that Officer Matthews "stomped" on his back and slapped his face twice on the way to the segregation cell, Leyva did not suffer any type of injuries from either alleged physical assault. An actual injury need not be sustained in order to support an

excessive force claim. However, the lack of evidence of any injury may be used to show that excessive force was not employed. *Meyer v. Robinson*, 992 F.2d 734, 739 (7th Cir. 1993)("While excessive force does not require injury, *Lester v. City of Chicago,* 830 F.2d 706 (7th Cir. 1987), no injury gives weight to the assertion of no excessive force.").

Finally, the Court has viewed the DVD recordings of the November 5, 2012 incident. The video evidence does not support Leyva's excessive force claim. The video evidence does not even raise a question of fact that would preclude summary judgment. *Scott v. Harris*, 550 U.S. 372, 580 (2007)(holding that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *Brady v. Stone*, 2010 WL 2870208, * 14 (E.D. Mich. 2010)("[Plaintiff]'s testimony regarding this occurrence is directly contradicted by the videotape evidence and [Plaintiff]'s admissions to police investigators and medical providers. [Plaintiff]'s testimony is inherently unbelievable, contrary to the record and insufficient as a matter of law to support a cause of action for excessive force under the Fourth Amendment."). The video does not show Officer Matthews either stomping on Leyva's back or slapping him in the face. Accordingly, Officer Matthews is entitled to summary judgment on Leyva's excessive force claim against him.

Because Officer Matthews is entitled to summary judgment on Leyva's excessive force claim, Leyva's failure to protect or to intervene claim against Sgt. Schloendorf is easily resolved. In order to be held liable for a failure to intervene or to protect, there must have been an underlying constitutional violation. *Fillmore v. Page*, 358 F.3d 496, 506 (7th Cir. 2004).

Here, there was no underlying Constitution violation in that Officer Matthews did not use unconstitutional force against Leyva. In other words, Sgt. Schloendorf cannot be held liable for

failing to intervene or to protect Leyva from excessive force that did not occur. Accordingly, Sgt. Schloendorf is entitled to summary judgment on Leyva's failure to protect or to intervene claim.

Sgt. Schloendorf is also entitled to summary judgment on Leyva's conditions of confinement claim. The United States Supreme Court has made clear that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions;' it outlaws cruel and unusual 'punishments.'" *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).[1] This means that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as an infliction of punishment." *Id*. at 838.

Accordingly, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. at 837. This type of deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Duckworth v. Frazen*, 780 F.2d 645, 653 (7th Cir. 1985). "[M]ere negligence or even gross negligence does not constitute deliberate indifference," *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996), and it is not enough to show that a prison official merely failed to act reasonably. *Gibbs v. Franklin*, 49

[1] As a pretrial detainee, Leyva's claim arises under the Fourteenth Amendment, not the Eighth, but that is a distinction without a difference. "[C]ourts still look to Eighth Amendment case law in addressing the claims of pretrial detainees, given that the protections of the Fourteenth Amendment's due process clause are at least as broad as those that the Eighth Amendment affords to convicted prisoners, and the Supreme Court has not yet determined just how much additional protection the Fourteenth Amendment gives to pretrial detainees." *Rice ex rel. Rice v. Correctional Med. Servs.*, 675 F.3d 650, 664-65 (7th Cir. 2012)(internal citations omitted).

F.3d 1206, 1208 (7th Cir. 1995), *abrogated on other grounds, Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996).

Here, Leyva failed to present any evidence that his segregation cell was of such a degree that it violated his Due Process rights or constituted cruel and unusual punishment. Leyva acknowledged during his deposition that he did not ask for the temperature to be adjusted, and he never complained about any feces being on the walls. As noted *supra*, Sgt. Schloendorf cannot be held liable for violations of which he was unaware. *Farmer*, 511 U.S. at 838.

Moreover, "routine discomfort is part of the penalty that criminal offenders pay for their offenses against society," and so, "extreme deprivations are required to make out a conditions-of-confinement claim." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)(internal quotations omitted). Indeed, "the Constitution . . . does not mandate comfortable prisons." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). If prison conditions are merely "restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S. 349 (1981). Thus, prison conditions rise to the level of an Eighth Amendment violation only when they "involve the wanton and unnecessary infliction of pain." *Id*. at 347.

Furthermore, Leyva has not demonstrated the type of conduct by Sgt. Schloendorf that deprived him of the minimally civilized measure of life's necessities. Leyva admits that he was in the cell for only thirty-six (36) hours, and the water was turned off because he had flooded the cell. *Chandler v. Crosby*, 379 F.3d 1278, 1295 (11th Cir. 2004)("[T]he Eighth Amendment is concerned with both the 'severity' and the 'duration' of the prisoner's exposed to inadequate cooling and ventilation."); *Dixon v. Godinez*, 114 F.3d 640, 643 (7th Cir. 1997)("[I]t is not just the severity of the cold, but the duration of the condition, which determines whether the conditions of confinement are unconstitutional.").

Finally, Leyva does not allege and has not shown any harm resulting from the alleged unconstitutional conditions. *Vasquez v. Frank*, 2008 WL 3820466, * 2-3 (7th Cir. Aug. 15, 2008) (holding that ventilation that allegedly caused dizziness, migraines, nasal congestion, nose bleeds and difficulty breathing did not rise to the level of an Eighth Amendment violation); *Jasman v. Schmidt*, 2001 WL 128430, * 2 (6th Cir. Feb. 6, 2001)(rejecting a prisoner's complaint about poor ventilation where plaintiff failed to allege harm caused by the ventilation). As such, Leyva has failed to offer any evidence to support a conditions of confinement claim sufficient to demonstrate a Constitutional violation or to preclude summary judgment. *Chandler*, 379 F.3d at 1290-98 (citing cases and concluding that a ventilation system that allowed summer temperatures to average eighty-five or eighty-six degrees during the day and eighty degrees at night was not sufficiently extreme to violate the Eighth Amendment where such temperatures were expected and tolerated by the general public in Florida). At the most, Leyva has claimed uncomfortable conditions, but he has not alleged a violation of his Constitutional rights. *E.g.*, *Strope v. Sebelius*, 2006 WL 2045840, * 2 (10th Cir. July 24, 2006)("Mr. Strope claims that the prison lacks adequate ventilation, and that fans are necessary to control the 'excessively hot' temperature and to provide ventilation. He further asserts that the high temperatures make it hard to sleep. Although these conditions are no doubt uncomfortable, we conclude that Mr. Strope's allegations are insufficient to state a claim of violation of the Eighth Amendment."); *Deal v. Cole*, 2013 WL 1190635, * 2 (W.D.N.C. Mar. 22, 2013)("Plaintiff's allegations of cold air in his cell, without more, are not sufficiently objectively serious to state a claim under the Eighth Amendment."); *Cameron v. Howes*, 2010 WL 3885271, * 9 (W.D. Mich. Sept. 28, 2010)(dismissing plaintiffs' claim for failing to allege extreme deprivation as a result of inadequate ventilation causing high temperatures in the cells).

In sum, Leyva has not shown conditions so egregious that would trigger the Constitution's protections. *Jackson v. Duckworth,* 955 F.2d 21, 22 (7th Cir. 1992)(objective component met where prison conditions were "so strikingly reminiscent of the Black Hole of Calcutta"). Prisoners cannot expect the "amenities, conveniences, and services of a good hotel." *Harris v. Fleming,* 839 F.2d 1232, 1235 (7th Cir. 1988); *Lunsford v. Bennett,* 17 F.3d 1574, 1581 (7th Cir. 1994)("[t]he Constitution does not require prison officials to provide the equivalent of hotel accommodations or even comfortable prisons."). Accordingly, Sgt. Schloendorf is entitled to summary judgment on Leyva's conditions of confinement claim.

Finally, the Court declines to exercise supplemental jurisdiction over Leyva's state law claim against Kankakee County and Sheriff Bukowski. "In general, 'when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits.'" *Lalowski v. City of Des Plaines*, 789 F.3d 784, 794 (7th Cir. 2015)(quoting *Wright v. Associated Ins. Cos. Inc.,* 29 F.3d 1244, 1251 (7th Cir. 1994)).

Here, the Court has entered summary judgment against Leyva on all of his federal claims. Therefore, the Court will follow the general rule and will decline to exercise supplemental jurisdiction over Leyva's state law claim against Kankakee County and Sheriff Bukowski.

IT IS, THEREFORE, ORDERED:

1. Defendants' Motion for Summary Judgment [23] is GRANTED. The Clerk of the Court is directed to enter judgment in Defendants Matthews and Schloendorf's favor and against Plaintiff. The Court declines to exercise supplemental jurisdiction over Defendants Kankakee County and Sheriff Bukowski. All pending motions are denied as

moot, and this case is terminated, with the Parties to bear their own costs. All deadlines and settings on the Court's calendar are vacated.

2. If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4).

3. If Plaintiff wishes to proceed in forma pauperis on appeal, his motion for leave to appeal in forma pauperis must identify the issues that he will present on appeal to assist the Court in determining whether the appeal is taken in good faith. *See* Fed. R. App. P. 24(a)(1)(c); *Celske v. Edwards*, 164 F.3d 396, 398 (7th Cir. 1999)(an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a responsible assessment of the issue of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000)(providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff chooses to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

Entered this 6th day of February, 2017

s/ Sara L. Darrow
SARA L. DARROW
UNITED STATES DISTRICT JUDGE