IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JUSTIN MICHAEL TRUCKEY,

OPINION AND ORDER

Plaintiff,

10-cv-414-bbc

v.

JANEL NICKEL, DYLON RADTKE,
CAPTAIN BRANT, CAPTAIN ZANON,
SERGEANT TIMM and CO II BERRET,

Defendants.

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In this prisoner civil rights lawsuit brought under 42 U.S.C. § 1983, plaintiff Justin Michael Truckey has filed a proposed complaint in which he contends that each of the defendants should be held liable for actions they took before or after plaintiff was sexually assaulted by another prisoner in 2009 and 2010. Because plaintiff is a prisoner I must screen the complaint under 28 U.S.C. §§ 1915 and 1915A to determine whether it states a claim upon which relief may be granted. Having reviewed the complaint, I conclude that he has stated a claim upon which relief may be granted with respect to each of the defendants.

DISCUSSION

The Supreme Court recognized in Farmer v. Brennan, 511 U.S. 825 (1994), that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." See also Borello v. Allison, 446 F.3d 742, 747 (7th Cir. 2006). Under the test set forth in Farmer, the question is whether prison officials are "deliberately indifferent" to a "substantial risk of serious harm" to the prisoner's safety. In practical terms, a claim under Farmer has four elements:

- Is there a risk that plaintiff will be seriously harmed?
- Is the risk a substantial one?
- Is the prison official aware of the risk?
- If the prison official does know of the risk, has he taken reasonable measures to avert the risk?

Fisher v. Lovejoy, 414 F.3d 659, 662 (7th Cir. 2005); Lewis v. Richards, 107 F.3d 549, 553 (7th Cir. 1997); Langston v. Peters, 100 F.3d 1235, 1238 (7th Cir 1996).

There is no question that a sexual assault is a sufficiently serious harm to trigger an officer's duty under the Eighth Amendment. E.g., Case v. Ahitow, 301 F.3d 605 (7th Cir. 2002); Billman v. Indiana Dept. of Corrections, 56 F.3d 785 (7th Cir. 1995); Swofford v. Mandrell, 969 F.2d 547 (7th Cir. 1992). The primary question at this stage is whether plaintiff has alleged that each defendant was personally involved in a constitutional

violation. I will consider plaintiff's allegations against each defendant in turn.

A. Defendants Timm and Berret

Plaintiff alleges that defendants Timm and Berret were officers who worked in the "control bubble" for plaintiff's unit at the Columbia Correctional Institution. On six separate occasions between October 2009 and January 2010, Timm and Berret opened plaintiff's cell door to allow prisoner TH to enter the cell, even though they knew that plaintiff was "red tagged," which means that no other prisoner is allowed to enter plaintiff's cell at any time. On each of these occasions, prisoner TH sexually assaulted plaintiff.

These allegations would not be enough on their own to prove that defendants Timm and Berret knew of a substantial risk that prisoner TH would sexually assault plaintiff, but plaintiff does not have to prove his claim in his complaint. It is enough if plaintiff alleges "enough facts to raise [the claim] above the level of mere speculation." Riley v. Vilsack, 665 F. Supp. 2d 994, 997 (W.D. Wis. 2009). See also Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2009) ("Factual allegations must be enough to raise a right to relief above the speculative level."). If Timm and Berret were allowing prisoners into plaintiff's cell despite a clear rule to the contrary, this suggests that they may have been aware of other facts that would support plaintiff's claim as well. In other words, plaintiff's allegations are enough to "nudg[e his] clai[m] across the line from conceivable to plausible." Twombly, 550

U.S. at 570. Accordingly, I will allow him to proceed on a claim that defendants Timm and Berret violated his rights under the Eighth Amendment by failing to prevent plaintiff from being sexually assaulted. At summary judgment or trial, it will be plaintiff's burden to adduce evidence that would allow a reasonable jury to find that Timm and Berret knew of substantial risk that plaintiff would be sexually assaulted, but they failed to take reasonable steps to prevent it. Ruffin-Thompkins v. Experian Info. Solutions, Inc., 422 F.3d 603, 607 (7th Cir. 2005) (at summary judgment, plaintiff "retains the burden of producing enough evidence to support a reasonable jury verdict in his favor").

B. Defendant Nickel

Defendant Janel Nickel is the security director for the prison. Plaintiff does not allege that she is responsible for failing to prevent a past assault, but that she is failing to protect him from a *future* assault. In particular, plaintiff alleges that he is still housed near prisoner TH, that he has been complaining to defendant Nickel about this and that she has failed to take any action. A prisoner need not wait until he is assaulted or worse before obtaining injunctive relief. Farmer, 511 U.S. at 845; Helling v. McKinney, 509 U.S. 25, 33-34 (1993). Accordingly, I will allow plaintiff to proceed on a claim under the Eighth Amendment against defendant Nickel.

Plaintiff includes an allegation in his complaint that defendant Nickel failed to

contact the sheriff's department as she said she would after he reported the assaults. It is not clear whether plaintiff intends to bring a separate claim on this issue or whether he includes it as background. In any event, plaintiff cannot proceed on a claim that an official failed to take appropriate action to prosecute prisoner TH. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) ("[T]he Constitution . . . does not require states to prosecute persons accused of wrongdoing.")

C. Defendants Brant, Zanon and Radtke

Plaintiff does not allege that defendant Brant, Zanon and Radtke are responsible for failing to prevent a past or future sexual assault. Rather, he alleges that each of them violated his constitutional rights by disciplining him after he reported the assault. In particular, plaintiff alleges that, after he reported the sexual assaults, defendants Brant and Zanon came from the Green Bay Correctional Institution to question him. They gave him a false conduct report in which they accused him of engaging in consensual sexual conduct and lying about whether it was consensual. Defendant Radtke found plaintiff guilty of these allegations and imposed a sentence of 180 days in disciplinary separation, which is a form of segregation.

Plaintiff's allegations against defendants Brant, Zanon and Ratdke could support three separate legal theories. First, plaintiff may mean to contend that Brant, Zanon and

Radtke subjected him to cruel and unusual punishment by disciplining him for being sexually assaulted, in violation of the Eighth Amendment. The second theory is that defendants retaliated against plaintiff for complaining about being sexually assaulted, in violation of the First Amendment. Third, defendant Radtke denied him due process in the context of finding him guilty. I will consider each of these theories in turn.

1. Eighth Amendment

With respect to the Eighth Amendment theory, the United States Supreme Court and the Court of Appeals for the Seventh Circuit have recognized that "forms of punishment that are permitted for serious crimes may violate the clause if imposed for trivial ones." Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir. 2001) (citing Solem v. Helm, 463 U.S. 277 (1983); Rice v. Cooper, 148 F.3d 747, 752 (7th Cir. 1998); Leslie v. Doyle, 125 F.3d 1132, 1135 (7th Cir. 1997); United States v. Saccoccia, 58 F.3d 754, 787-89 (1st Cir. 1995)). Although this "norm of proportionality" is usually discussed in the context of sentencing for a criminal conviction, in Pearson, 237 F.3d at 885, the court stated that it could apply to prison discipline. If it violates the Eighth Amendment to impose certain punishment for "trivial" infractions, then it follows that imposing a serious punishment for being a victim of a crime would be a violation as well. Leslie, 125 F.3d at 1135 ("[A] punishment imposed for no offense at all is, as a matter of mathematics, disproportionate."). Alternatively, plaintiff's

claim may be similar to cases in which courts have held that the government may not punish someone for his status or for engaging in conduct he was powerless to avoid. Robinson v. California, 370 U.S. 660, 667 (1962) (concluding that statute criminalizing being "addicted to the use of narcotics" violated Eighth Amendment because it is "an illness which may be contracted innocently or involuntarily"); Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006) (statute prohibiting homeless people from sitting, lying or sleeping on public streets and sidewalks violates Eighth Amendment because homeless people cannot avoid doing those things).

If defendants Brant, Zanon and Radtke honestly believed that plaintiff had engaged in consensual conduct, it could not be said that they punished plaintiff for being sexually assaulted, even if their belief turned out to be wrong. Cf. Wilson v. Seiter, 501 U.S. 294, 299-300 (1991) (Eighth Amendment "mandate[s] inquiry into a prison official's state of mind" because word "punishment" in amendment implies "intent requirement"). However, at this stage of the proceedings, it is reasonable to infer from plaintiff's allegations that Brant, Zanon and Radtke knew that plaintiff had been sexually assaulted, but they punished him anyway. At summary judgment or trial, plaintiff will have to prove with "specific facts," Fed. R. Civ. P. 56, that defendants did not honestly believe that plaintiff was lying about being assaulted.

2. First Amendment

With respect to plaintiff's First Amendment theory, the court of appeals has held that prison officials may not discipline a prisoner or take other adverse action against him because he complained about his prison conditions. E.g., Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009). Because plaintiff is alleging that defendants disciplined him immediately after he complained about being assaulted, plaintiff has stated a claim for retaliation. To prevail on this claim at summary judgment or trial, plaintiff will have to prove that defendants issued a conduct report and placed him in segregation because he complained about his conditions, not because they believed he was lying about the conditions he endured.

3. Due process

I understand plaintiff to be alleging that defendant Radtke violated his right to due process because Radtke was biased against him at the disciplinary hearing. A threshold question is whether the discipline plaintiff received is the type of deprivation that triggers the protections of the due process clause. Although the Fourteenth Amendment prohibits state government from "depriv[ing] any person of . . . liberty . . . without due process of law," not every restriction on freedom of movement qualifies as a "depriv[ation]" of "liberty" under Supreme Court jurisprudence. When an individual is incarcerated and his liberty is

already severely restricted, the types of deprivations that qualify are necessarily limited even further.

In Sandin v. Connor, 515 U.S. 472, 484 (1995), the Supreme Court rejected the argument that "any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause." Instead, the Court held that prisoners are entitled to process under the Constitution if the discipline they receive increases their duration of confinement or subjects them to an "atypical and significant" hardship. If the discipline does not fall into one of these categories, a prisoner has no recourse under the due process clause, even if he did not receive a hearing or even if the charge against him was a lie.

In Sandin, 515 U.S. at 486, the Court held that the prisoner's placement in disciplinary segregation for 30 days "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." The Court noted that "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody" and that "the conditions at [the prison] involve significant amounts of 'lockdown time' even for inmates in the general population." Id. The Court of Appeals for the Seventh Circuit has stated that, after Sandin, "it becomes apparent that the right to litigate disciplinary confinements has become vanishingly small." Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997). See also Townsend v. Fuchs, 522 F.3d 765, 771 (7th Cir. 2008) ("[W]e have concluded that

inmates have no liberty interest in avoiding transfer to discretionary segregation—that is, segregation imposed for administrative, protective, or investigative purposes."); Hoskins v. Lenear, 395 F.3d 372, 374-75 (7th Cir. 2005) (prisoner not entitled to process for discipline of two months' segregation, loss of prison job, loss of privileges and transfer).

However, in Marion v. Columbia Correctional Institution, 559 F.3d 693 (7th Cir. 2009), the court concluded "that disciplinary segregation can trigger due process protections depending on the duration and conditions of segregation." In that case, the court held that a prisoner stated a claim under the due process clause by alleging that he was placed in segregation for 240 days without due process. Although plaintiff's sentence was 180 days rather than 240, I conclude that that it is long enough to state a claim. Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995) (six months in segregation may be long enough). This means that, at summary judgment or trial, plaintiff will have to show that his conditions in segregation are "harsher than the conditions found in the most restrictive prison in Wisconsin." Marion, 559 F.3d at 698.

The other question is whether plaintiff received the process he was due. Plaintiff alleges that the conduct report was the only evidence Radtke used to determine plaintiff's guilt. Even if that is true, it would not mean Radtke violated plaintiff's right to due process. McPherson v. McBride, 188 F.3d 784, 786 (7th Cir. 1999) (concluding that incident report is sufficient to support finding of guilty in disciplinary hearing). However, plaintiff also

alleges generally that Radtke was biased against him and determined to find him guilty regardless of the evidence. "A hearing where the decisionmaker has prejudged the outcome does not comport with due process because it effectively denies the [plaintiff] the opportunity to respond to the accusations against him." Powers v. Richards, 549 F.3d 505, 511-12 (7th Cir. 2008). Accordingly, I will allow plaintiff to proceed on this claim. At summary judgment or trial, plaintiff will have to show through specific evidence that Radtke was not an impartial decision maker. Id. at 512.

ORDER

IT IS ORDERED that

1. Plaintiff Justin Michael Truckey is GRANTED leave to proceed on the following claims:

(a) defendants Timm and Berret failed to prevent another prisoner from sexually assaulting plaintiff in 2009 and 2010, in violation of the Eighth Amendment;

(b) defendant Janel Nickel is subjecting plaintiff to a substantial risk of serious harm by housing him near the prisoner who sexually assaulted him, in violation of the Eighth Amendment;

(c) defendants Brant and Zanon issued a conduct report to plaintiff after he complained about the sexual assault, in violation of the First Amendment and Eighth

Amendment;

(d) defendant Radtke found plaintiff guilty of lying and engaging in sexual conduct, in violation of the First Amendment, the Eighth Amendment and the due process clause.

2. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

3. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

4. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the

Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 13th day of August, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge