IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATANAEL RIVERA,

ORDER

Plaintiff,

12-cv-240-bbc

v.

MACHEAL SCHULTZ, CORRECTIONAL OFFICER MINNING,
CORRECTIONAL OFFICER PETERSON, GEORGE JIMINEZ,
PETE ERICKSON, MACHEAL BAENEN and JOHN DOES 1-12,

Defendants.

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The proposed complaint in this case brought under 42 U.S.C. § 1983 is ready for screening under 28 U.S.C. § 1915(e)(2) and § 1915A, which require the court to review the allegations in plaintiff's complaint to determine whether it states a claim upon which relief may be granted. Plaintiff Natanael Rivera alleges that various prison officials searched his person for the sole purpose of harassment on two occasions on April 28, 2011. I conclude that plaintiff may proceed on the second claim only. In addition, I am dismissing the complaint as to some of the defendants because plaintiff does not allege that they were personally involved in either incident.

With respect to the first incident, plaintiff alleges that defendants Schultz and Peterson escorted him to a review hearing. After defendant Schultz placed restraints on plaintiff, Peterson conducted a pat down search. When Peterson was finished, Schultz told

him to conduct another pat down search. Although Peterson told Schultz that he had already conducted a search, Schultz laughed while saying, "it does not matter" and that plaintiff "prob[ab]ly like[s] it any way."

Later the same day, defendant Schultz directed defendant Minning to conduct another pat down search of plaintiff when he was returning to his cell from the recreation room. Peterson and an unknown officer held plaintiff "by his arms" while Minning kneeled and pulled plaintiff's pants down. Minning then stood up, laughed and said, "Oop[s], there goes a lawsuit." Schultz made his "own sexual comments" as the officers' "laughter roar[ed] in plaintiff['s] ears."

The circumstances under which a search conducted in the prison setting violates the Constitution are very limited. Because of the importance of maintaining security in prison, both the Supreme Court and the Court of Appeals for the Seventh Circuit have concluded that officials must have great discretion in determining when and what kind of search is appropriate. Hudson v. Palmer, 468 U.S. 517, 527; Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994). Even in the context of strip searches, prison officials do not need particularized suspicion of wrongdoing. Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 695 (7th Cir.1998) (upholding various routine strip searches of prisoner, including those that occur "whenever prison officials undertake a general search of a cell block").

In determining the constitutionality of searches in prison, the court of appeals has held that the Eighth Amendment rather than the Fourth Amendment provides the appropriate standard and the court has applied a standard similar to the one applied in

excessive force cases. In particular, the question is whether the search was "conducted in a harassing manner intended to humiliate and inflict psychological pain." Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003). Thus, so long as the officers conducted the search for the purpose of finding contraband or for another legitimate purpose, the search is not unconstitutional simply because the prisoner believes that officials had no reason to suspect that he was hiding anything. Further, in all cases involving an alleged use of excessive force, the plaintiff must show that the defendant used more than a minimal amount of force. Hudson v. McMillian, 503 U.S. 1, 9-10 (1992) ("The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition de minimis uses of physical force.").

Under this standard, plaintiff cannot proceed on his claim that defendants Schultz and Peterson performed a second, unnecessary pat down search. Plaintiff does not allege that Schultz or Peterson groped him or removed any of his clothes. A simple pat down search subjects a prisoner to a minimal amount of force that is not sufficiently serious to implicate the Eighth Amendment. Wilkins v. Gaddy, 130 S. Ct. 1175, 1178 (2010) ("[N]ot every malevolent touch by a prison guard gives rise to a federal cause of action.") (internal quotations omitted). See also Vanden Heuvel v. Zwicky, 2011 WL 833254, *6 (E.D. Wis. 2011) ("[C]ourts have found that isolated incidents of harassment, involving verbal harassment and touching, are not generally severe enough to be 'objectively, sufficiently serious.'"). Accordingly, I am dismissing the complaint as to the pat down search.

The alleged incident involving defendants Schultz, Minning, Peterson and the

unknown officer is potentially more serious because it involved a situation in which defendants restrained plaintiff while forcibly removing his clothes. In addition, it is reasonable to infer from plaintiff's allegations at this stage of the proceedings that these defendants engaged in this conduct without a legitimate reason and for the sole purpose of harassing and humiliating him. In particular, plaintiff alleges that Minning removed plaintiff's pants for no apparent reason and stated "Oops, there goes a lawsuit," followed by laughter of Minning, Schultz and the unknown officer. These allegations are sufficient to state a claim upon which relief may be granted under the Eighth Amendment.

Although plaintiff does not know the names of one of the officers involved, that is not a reason for dismissing the claim. "[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996). Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference with plaintiff and counsel for defendants and will discuss with them the most efficient way to obtain identification of the unnamed defendant. He will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendant.

At summary judgment or trial, plaintiff will have to come forward with specific evidence to prove each element of his claim. That is, he will have to prove that defendants used more than a minimal amount of force against him and that they did so for the sole purpose of harassing or humiliating him.

Plaintiff does not include any allegations in his complaint about defendants Jimenez, Erickson, Baenen or the 11 other John Doe defendants. Because a defendant may not be held liable under § 1983 unless he was personally involved in the alleged constitutional violations, Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir.2009), I am dismissing the complaint as to these defendants.

ORDER

IT IS ORDERED that

1. Plaintiff Natanael Rivera is GRANTED leave to proceed on his claim that defendants Schultz, Peterson, Minning and an unknown officer subjected him to a strip search for the purpose of harassing and humiliating him, in violation of the Eighth Amendment.

2. Plaintiff is DENIED leave to proceed on his claim that defendants Schultz and Peterson subjected him to a pat down search for the purpose of harassing and humiliating him, in violation of the Eighth Amendment.

3. The complaint is DISMISSED as to defendants Jimenez, Erickson, Baenen and John Does 2-12 for plaintiff's failure to allege that they were personally involved in the alleged constitutional violations.

4. 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.

5. 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 their documents.

6. 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.

7. 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

"prudential" standing, "can be deemed waived if not raised in the district court." Bd. of Natural Res. v. Brown, 992 F.2d 937, 946 (9th Cir.1993).fund account until the filing fees have been paid in full.

Entered this 5th day of July, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge