IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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REGGIE L. TOWNSEND,

OPINION and ORDER

Plaintiff,

12-cv-896-bbc

v.

CAPTAIN PULVER, CAPTAIN SCHUELER, 1ST SHIFT SGT. and SECOND SHIFT SGT.,

Defendants.

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Pro se plaintiff Reggie Townsend has filed a proposed amended complaint in response to the court's order dated February 21, 2013, in which I asked him to clarify his allegations. From a review of his amended complaint, I understand plaintiff to be alleging that defendants Pulver and Schueler placed him in the same cell with a white supremacist prisoner and then, as retaliation against plaintiff for filing a lawsuit against other prison officials several years ago, refused to separate the two prisoners for several weeks. I understand him to be raising claims under the Eighth Amendment, the First Amendment and state negligence law. I conclude that he has stated a claim upon which relief may be granted against defendants Pulver and Scheuler with respect to each of those theories.

Plaintiff has asked that I dismiss his claims against "1st Shift Sgt." and "2nd Shift Sgt." without prejudice to his refiling a claim against them if he discovers more information about them. That request will be granted. Finally, I am denying plaintiff's motion for court

assistance in recruiting counsel without prejudice to his refiling it at a later date.

OPINION

A. Eighth Amendment

Under the Eighth Amendment, "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." Farmer v. Brennan, 511 U.S. 825 (1994). 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 three elements:

- Was there a substantial risk that plaintiff would be seriously harmed?
- Was the prison official aware of the risk?
- If the prison official did know of the risk, did he consciously refuse to take reasonable measures to prevent the harm from occurring?

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).

In this case, plaintiff alleges that the other prisoner is a known white supremacist with a swastika tattoo and a history of violence toward people of color. In addition, plaintiff alleges that the other prisoner assaulted him many times over the course of a month while they were in the same cell, both before and after he complained to defendants about the placement. Thus, at this stage, plaintiff's allegations are sufficient to show that he was

subjected to a substantial risk of serious harm and that no one prevented him from being assaulted.

The only question is whether plaintiff has alleged that defendants were personally responsible for the assaults. In his amended complaint, he says that he does "not know who placed [the other prisoner] in the [same] cell . . . but I'm told that officer Pulver and Schueler run segregation [where plaintiff was housed] and all moves go through them." Dkt. #13 at 6. For the purpose of pleading, I conclude that this allegation is enough to show that defendants were responsible for placing the white supremacist in plaintiff's cell. If plaintiff learns during discovery that another prison official is responsible for the placement, he should file a motion for leave to amend his complaint. Regardless, it will be plaintiff's burden at summary judgment and trial to identify with admissible evidence the individual or individuals who made that decision.

It also is not clear what defendants knew about the other prisoner's dangerousness while he was housed with plaintiff. Although plaintiff alleges that he wrote letters to both defendants soon after the other prisoner was moved into plaintiff's cell, he does not describe the content of those letters except to say that he made defendants "aware of [his] situation." Id. At the end of his amended complaint, he directs the court to attachments to his original complaint, which he says will show that defendants were "notified through request slips." There is one undated interview request included in the attachments in which plaintiff wrote, "on May 10, 2012 I wrote you asking to move me or my cell mate due to who he is and his beliefs but now he has been calling me names and he told that if I tell that he would kill me.

He already hit me once and grab[bed] my neck. Please move me, a request was sent to Cpt. Schueler." Dkt. #1-3 at 1. There is no indication on the request to whom the request is directed, but plaintiff says that he sent it to defendant Pulver.

At this stage of the proceedings, it is reasonable to infer that defendants knew that the other prisoner posed a substantial risk of serious harm to plaintiff, either because of information in a letter plaintiff sent or because, as officials in charge of the segregation unit, they were aware of the other prisoner's history. Again, at summary judgment and trial, it will be plaintiff's burden to come forward with specific evidence showing that each defendant was aware that plaintiff was being subjected to a substantial risk of serious harm.

B. First Amendment

Prison officials may not retaliate against a prisoner for exercising a constitutional right. Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). Plaintiff has a constitutional right of access to the courts, which includes the right to file nonfrivolous lawsuits. Lehn v. Holmes, 364 F.3d 862, 868 (7th Cir. 2004).

I understand plaintiff to be alleging that defendants' initial decision to house the other prisoner with plaintiff and their refusal to move him was an attempt to retaliate against him for another lawsuit he filed against prison officials several years ago that ended with a jury verdict in his favor. Townsend v. Allen, No. 05-cv-204-bbc (W.D. Wis.) He believes it was retaliatory because "there was no reason to move [the other prisoner] from a cell that was completely empty into [plaintiff's] cell," which was meant for only one person; it was well

known that the other prisoner was a white supremacist; the other prisoner was 100 lbs. heavier and almost a foot taller than plaintiff; after the other prisoner had assaulted plaintiff multiple times, the other prisoner was returned to the same empty cell from which he was originally transferred. In addition, in a document accompanying his amended complaint, he says that a correctional officer who was a witness in that case now works at the Fox Lake prison. Dkt. #12 at 2.

Plaintiff has not made the strongest claim of retaliation, but at this stage, his allegations are sufficient to state a claim upon which relief may be granted. Swanson v. Citibank, NA, 614 F.3d 400 (7th Cir. 2010) (complaint alleging discrimination is sufficient if it "identifies the type of discrimination that she thinks occur[red] . . ., by whom . . . and when"). In going forward with this claim, plaintiff should know that he has a difficult road ahead of him. A claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many prisoners make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove his claim with the allegations in his complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

Plaintiff will have to come forward with *evidence* either at summary judgment or at trial that defendants were motivated by his lawsuit. For example, plaintiff will first have to prove that both defendants knew he had filed the lawsuit. Salas v. Wisconsin Dept. of Corrections, 493 F.3d 313 (7th Cir. 2007) (in retaliation case, plaintiff must show that defendant knew

that plaintiff was engaging in protected conduct). However, such knowledge will not be sufficient by itself to prove his claims. Rather, he will have to show that similarly situated prisoners not engaging in similar protected conduct were treated better than he was, cf. Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir. 2006), or point to other evidence suggesting a retaliatory motive, such as suspicious timing or statements by defendants suggesting that they were bothered by the protected conduct. E.g., Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005). Plaintiff may also support his claim by coming forward with evidence that defendants' reasons for housing him with the other prisoner are pretextual, meaning that they are lies covering up their true retaliatory motives. If plaintiff does not have evidence necessary to prove his claim and does not have a reasonable basis to believe that he will be able to obtain such evidence after an opportunity for discovery, he should not pursue this claim.

C. Negligence

Finally, I understand plaintiff to contend that defendants were negligent by allowing him to be housed with a white supremacist. Because this claim arises out of the same set of facts as plaintiff's federal claims, an exercise of supplemental jurisdiction is appropriate. 28 U.S.C. § 1367. Further, plaintiff has filed a copy of his notice of claim that is dated August 3, 2012, dkt. #1-3 at 9, making it reasonable to infer that his claim has been denied. Wis. Stat. § 893.82(3m) ("[A] prisoner may not commence the civil action or proceeding until the attorney general denies the claim or until 120 days after the written notice . . . is served upon

the attorney general, whichever is earlier."). To prevail on this claim, plaintiff will have to prove the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) injury or injuries, or damages. Paul v. Skemp, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001) (citing Nieuwendorp v. American Family Insurance Co., 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995)). Plaintiff's allegations are sufficient at this stage to state a claim upon which relief may be granted under that standard.

D. Motion for Assistance in Recruiting Counsel

Plaintiff accompanied his original complaint with a motion for appointment of counsel. Because the court has no statutory authority to require a lawyer to represent a particular litigant, Pruitt v. Mote, 503 F.3d 647, 653 (7th Cir. 2007), I am construing his motion as one seeking court assistance in recruiting counsel under 28 U.S.C. § 1915(e)(1). Before a district court can consider such motions, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down.

In this case, plaintiff has submitted rejection letters from the Madison City Attorney's Office, the United States Department of Justice and the American Civil Liberties Union, dkt. #1-3 at 19-22; dkt. #8-1, but these letters are not a good indicator of plaintiff's ability to

find a lawyer on his own. The City of Madison does not represent prisoners in civil rights cases, as explained in the rejection letter. Although the Department of Justice can litigate cases involving prisoner issues, it informed plaintiff that it "only handles cases that arise from widespread problems that affect groups of people." Similarly, the ACLU stated that it "accepts very few cases for direction representation." Thus, regardless of the merit of plaintiff's claim, he had little to no chance that any of those organizations would represent him. Before I consider a motion for appointment of counsel, plaintiff should contact lawyers who litigate individual civil rights cases.

Even if I assumed that plaintiff's submissions satisfied Jackson, he has not shown that appointment of counsel is necessary in this case. Ideally, every deserving litigant would be represented by counsel, but, unfortunately, the pro se litigants who file lawsuits in this district vastly outnumber the lawyers who are willing and able to provide representation. For this reason, the court will seek to recruit counsel for a pro se litigant only when he demonstrates that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. Pruitt, 503 F.3d at 654-55. In this case, it is too early to make that determination.

Thus far, plaintiff has not demonstrated any reason to believe that he cannot represent himself competently in this case. Although plaintiff's original complaint had a few problems, plaintiff was able to correct these problems upon the court's request. His amended complaint is relatively clear and shows his familiarity with the legal concepts that are relevant to his case.

Shortly after defendants file their answer, the court will hold a preliminary pretrial conference at which plaintiff will be provided with information about how to use discovery techniques to gather the evidence he needs to prove his claims as well as copies of this court's procedures for filing or opposing dispositive motions and for calling witnesses. If later developments in the case show that plaintiff is unable to represent himself, he is free to renew his motion at that time.

ORDER

IT IS ORDERED that

1. Plaintiff Reggie Townsend is GRANTED leave to proceed on his claims that defendants Pulver and Schueler placed him in the same cell with a white supremacist prisoner and then refused to separate the two prisoners for several weeks after plaintiff complained to retaliate against plaintiff for filing a lawsuit against other prison officials several years ago, in violation of the Eighth Amendment, the First Amendment and common law negligence.

2. Plaintiff's request to dismiss the complaint as to defendants "1st Shift Sgt." and "2nd Shift Sgt." is GRANTED and those defendants are DISMISSED WITHOUT PREJUDICE to plaintiff's refiling his claim in the future.

3. Plaintiff's motion for court assistance in recuiting counsel, dkt. #8, is DENIED WITHOUT PREJUDICE to his refiling it later in the proceedings.

4. For the time being, 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 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

fund account until the filing fees have been paid in full.

Entered this 13th day of March, 2013.

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