

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHARLES EDWARD HILL,

Plaintiff,

v.

SERGEANT FORBES, *et al.*,

Defendants.

OPINION AND ORDER

12-cv-864-wmc

Plaintiff Charles Edward Hill has filed this proposed civil action pursuant to 42 U.S.C. § 1983, alleging violations of his constitutional rights during his confinement by the Wisconsin Department of Corrections (“DOC”). He has requested leave to proceed *in forma pauperis* and has paid an initial partial filing fee, but the court is also required by the Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. *See* 28 U.S.C. § 1915A(b). For reasons set forth briefly below, the court concludes that this case must be dismissed.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant’s pleadings, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts plaintiff’s well-pleaded allegations as true and assumes the following probative facts:

- Plaintiff Charles Edward Hill is and, for all times relevant to his complaint, was an inmate confined at the DOC's Red Granite Correctional Institution ("RGCI").
- All of the defendants are employed at RGCI: Sergeant Forbes; Officer Schiefelbein; Officer Reese; Sergeant Maglior; F-Unit Manager Sharon Harter; and Warden Michael Dittman.
- Hill alleges that he was assigned to share a cell in F-Unit with a "mentally ill, sexually depraved" inmate named Larry Szwick. Hill complains that Szwick had a habit of watching his cellmate's television and "masturbating constantly" while doing so. Citing the attendant release of bodily fluid, Hill claims that "[t]his is not a safe, healthy, or reasonable environment to be forced upon anyone for any reason."
- When Hill alerted defendant Sergeant Forbes about his cellmate's "disgusting behavior," he was told to stop complaining and "deal with it." By discouraging him from complaining about the conditions of his confinement, Hill contends that Forbes denied him due process and retaliated against him for exercising his right to pursue the grievance process.
- Hill also complained about his cellmate to defendants Schiefelbein, Maglior, and Reese. Each defendant reportedly "talked" to Szwick and "scolded him real good" about his behavior, but this only made the problem worse. Hill contends, therefore, that these defendants "failed to respond reasonably to this horrible situation."
- After living with Szwick for approximately one month, Hill finally filed a formal "Inmate Complaint" with defendant Harter, advising her of the "disgusting situation" with his cellmate. Instead of "dealing with the problem, which is Larry Szwick," Harter allegedly moved Hill to another unit. Harter also declined to investigate or punish defendants Forbes, Schiefelbein, Maglior and Reeves, in effect agreeing with those officers that inmates "must cell up with another person who is sick, disgusting, sexually depraved and nasty with no just cause." By moving Hill and not Szwick, Hill contends that Harter retaliated against him for filing his complaint and acted with deliberate indifference to his health and safety.
- Hill alleges further that as warden, defendant Dittman failed to adequately supervise his subordinates, making him responsible for the violations of Hill's constitutional rights.
- Hill seeks monetary damages, a declaratory judgment and "other equitable relief" in the form of a "full scale investigation" of the defendants' failure to "deal with" Szwick or remove him from the cell he shared with Hill.

OPINION

The Eighth Amendment prohibits “physically barbarous” or “cruel and unusual punishment,” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), as well as conditions of confinement that entail the “unnecessary and wanton infliction of pain.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)). “The Constitution does not mandate comfortable prisons, . . . but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal citation and quotation omitted). In that respect, the Eighth Amendment imposes a duty on prison officials to provide “humane conditions of confinement,” such as “adequate food, shelter, clothing, and medical care,” and must take “reasonable measures” to guarantee inmate safety. *Id.* at 832-33 (citations omitted).

To state an Eighth Amendment claim based on inhospitable prison conditions, an inmate must first allege that he suffered an objectively serious deprivation that denied him “the minimal civilized measure of life’s necessities,” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), such as shelter, heat, clothing, sanitation, and personal hygiene items. *Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006). Second, the inmate must allege that prison officials were subjectively aware, but deliberately indifferent to a substantial risk of serious harm to inmate health or safety. *Farmer*, 511 U.S. at 834. Under the deliberate indifference standard, “a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a

substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” *Id.* at 847.

Because routine discomfort is “part of the penalty that criminal offenders pay for their offenses against society,” *Rhodes*, 452 U.S., at 347, “only those deprivations denying ‘the minimal civilized measure of life’s necessities’ are sufficiently grave to form the basis of an Eighth Amendment violation.” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (citing *Wilson v. Seiter*, 501 U.S. 294, (1991) (quotation omitted)). In other words, only “extreme deprivations” will support an Eighth Amendment claim concerning conditions of confinement. *Delaney v. DeTella*, 256 F.3d 679, 683 (7th Cir. 2001) (citing *Hudson*, 503 U.S. at 9).

Here, Hill alleges that his cellmate’s behavior was disgusting and unsanitary. To the extent that he suffered emotional distress as the result of being housed under these conditions, a prisoner must establish a predicate physical injury before he can pursue damages for an emotional injury. *See* 42 U.S.C. § 1997e(e). He does not allege any physical injury or psychological trauma of the sort that would allow him to proceed with a claim for damages under § 1997e(e). Although he characterizes his cellmate’s actions were excessive and depraved, Hill also does not demonstrate that the roommate’s alleged misconduct created a condition that was sufficiently serious or extreme. Certainly, Hill does not allege facts showing that his conditions of confinement resulted in “the deprivation of an identifiable human need such as food, warmth, or exercise.” *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). Even Hill’s description of “semen being released into the cell,” although something Hill understandably found offensive and unhygienic, fails

to rise to this level, particularly since there is no allegation he was directly exposed to it in a way that might transmit a disease. Moreover, the relatively brief duration of Hill's shared cell assignment with Szwick, which lasted just over a month, works against him in this respect.

Likewise, while disquieting, Hill's circumstances were not compounded by a deprivation of other basic necessities. *See Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006) (explaining that prisons must provide "reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities"); *see also Vinning-El v. Long*, 482 F.3d 923, 923-25 (7th Cir. 2007) (prisoner was deprived of basic sanitation items and a mattress while he was incarcerated for six days in a cell in which blood and feces smeared the walls, water covered the floor, and the sink and toilet did not work); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir.1992) (prisoner was held in cell that allegedly was filthy and smelled of human waste, lacked adequate heating, contained dirty bedding, and had "rusted out" toilets, no toilet paper, and black worms in the drinking water); *Isby v. Clark*, 100 F.3d 502, 505-06 (7th Cir.1996) (prisoner was held in segregation cell that allegedly was "filthy, with dried blood, feces, urine and food on the walls"). Taking his allegations as true, the temporary conditions that he describes are better characterized as an inconvenience, than the sort of extreme deprivation that is cognizable under the Eighth Amendment. *See Johnson v. Pelker*, 891 F.2d 136, 138-39 (7th Cir. 1989).

In addition, the facts outlined by Hill do not show that his complaints were ignored. Although Defendant Forbes told Hill to "deal with it," Defendants Wilcox, Schiefelbein, Maglior and Reese confronted Szwick about his behavior after Hill

complained. As soon as Hill filed a formal grievance and notified Defendant Harter of his problem with Szwick, she promptly moved Hill to another cell. While Hill disagrees with the reasonableness of the defendants' response to his complaints, but his disagreement is not sufficient to demonstrate deliberate indifference for purposes of stating a violation of the Eighth Amendment. Absent a showing that he suffered an objectively serious deprivation of life's basic necessities, Hill may not proceed with a claim under the Eighth Amendment.

Finally, Hill claims that his transfer to a different cell was done in retaliation for his use of the grievance process. To state a claim for retaliation, a plaintiff must: (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by defendant that would likely deter a person of "ordinary firmness" from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff's protected activity was a motivating factor in defendant's decision to take retaliatory action. *See Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)).

An alleged retaliatory action need not independently violate the Constitution in order to be cognizable. *See Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996). Nevertheless, Hill's allegation that he was transferred to another cell within the same prison falls short of an adverse action sufficient to proceed with a retaliation claim. *See Morris v. Powell*, 449 F.3d 682, 685-86 (5th Cir. 2006) (collecting cases from the Second, Sixth, Seventh, and D.C. Circuits and holding that "an inmate must allege more than *de*

minimis retaliation to proceed with such a claim”). In that respect, he does not demonstrate that the transfer imposed any hardship at all, much less the kind of hardship that would deter a person of ordinary firmness from exercising his First Amendment rights in the future. See *id.* at 687 (observing that “transfer to a more dangerous section of the same prison is a sufficiently adverse retaliatory act to support a § 1983 claim”) (citing *Parker v. Carpenter*, 978 F.2d 190, 192-93 (5th Cir. 1992)). He does not otherwise allege facts from which retaliation may be plausibly inferred. For this reason, Hill may not proceed with a retaliation claim under 42 U.S.C. § 1983.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Charles Edward Hill’s request for leave to proceed with claims under the Eighth Amendment and for retaliation based on his use of the grievance system is DENIED.
- 2) The complaint is DISMISSED pursuant to 28 U.S.C. § 1915A(b) for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983.
- 3) The dismissal will count as a STRIKE for purposes of 28 U.S.C. § 1915(g).
- 4) Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly installments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the state prison where plaintiff is in custody, advising the warden of his obligation to deduct payments from plaintiff’s inmate trust fund account until the filing fee has been paid in full.

Entered this 22nd day of May, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge