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

KELSEY NELSON,

Plaintiff,

v.

JANE DOE 1, JANE DOE 2,
JOHN DOE, CAPTAIN FRANSON,
and BRYAN BARTOW,

Defendants.

OPINION AND ORDER

12-cv-573-wmc

Plaintiff Kelsey Nelson proposes to bring this action under 42 U.S.C. § 1983 against unidentified staff at the Wisconsin Resource Center and the Columbia Correctional Institution. Because Nelson is presently an inmate at the Columbia Correctional Institution, he seeks leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Nelson has provided, the court concluded that he is unable to prepay the full fee for filing this lawsuit and he has since made the initial payment of $124.98 required of him under § 1915(b)(1). Accordingly, the court must determine whether Nelson's proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Nelson's complaint arises out of his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment right to due process. He alleges that some prison staff exhibited deliberate indifference to the risk that he would attempt suicide, while others improperly punished him for acts beyond his control following a hearing in which he was

not allowed to call witnesses. For the reasons set forth below, the court will allow Nelson to proceed on his Eighth Amendment claim against defendants Jane Does 1 and 2, and on his Fourteenth Amendment claim against Captain Franson.

ALLEGATIONS OF FACT[1]

In addressing any pro se litigant's complaint, the court must read the allegations generously under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Consistent with these admonitions, Nelson alleges, and the court assumes for purposes of this screening order, the following facts:

- *Parties* -- Plaintiff Kelsey Nelson is presently confined at the Columbia Correctional Institution ("CCI") in Portage, Wisconsin. He was confined at the Wisconsin Resource Center ("WRC") in Winnebago, Wisconsin, during some of the events described in this complaint.

- Defendants John Doe, Jane Doe 1 and Jane Doe 2 are employed by the Wisconsin Department of Corrections as personal care technicians at WRC, and are responsible for the care and safety of the prisoners in their assigned unit.[2]

---

[1] The court draws all facts from plaintiff's complaint and attachments to his complaint. *Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) ("Attachments to the complaint become part of the complaint and the court may consider those documents in ruling on a motion to dismiss.").

[2] For the sole purpose of allowing plaintiff to discover the identities of the Doe defendants, the court has substituted as a nominal defendant Bryan Bartow, Director of WRC. *See Duncan v. Duckworth*, 644 F.2d 653, 656 (7th Cir. 1981) (suggesting that naming a senior prison official is appropriate "to insure that those more directly involved will be identified"). Plaintiff may proceed against Bartow in his official capacity only. Upon receipt of this order and a notice of appearance by an attorney on behalf of defendants, plaintiff should promptly use discovery to identify the Doe defendants. When he has learned their identities, plaintiff should move to amend his complaint to name them individually, so that they can be served, and to remove Bartow as a named defendant. If plaintiff is unsuccessful in his good faith attempts to identify the Does, he should ask the court to assist him in doing so. *See Donald v. Cook Cnty. Sheriff's Dep't*, 95 F.3d 548, 555 (7th Cir. 1996) ("To the extent the plaintiff faces barriers to determining

- Defendant "Captain Franson" is a stae correctional officer at CCI and responsible for overseeing conduct report hearings.

- *Suicide Attempt* -- On April 1, 2012, Nelson was having suicidal thoughts. He told Jane Does 1 and 2 that he was going to kill himself and asked to speak with a clinical services staff member. Nelson also told them that he had not been given his medication. Both Jane Does 1 and 2 ignored him, and drowned out his pleas for help by turning up the volume on the radio above his cell. Both Jane Does knew that Nelson had tried to kill himself only a few weeks earlier. At 4:00 p.m., Nelson covered the window of his cell, tied a sheet tightly around his neck, and attempted to kill himself through asphyxiation. Nelson was ultimately rescued by an unnamed staff member and placed on observation status.

- *Conduct Report* -- John Doe wrote Nelson up in a conduct report for his actions during and immediately after his suicide attempt. The report accused Nelson of being disruptive, disobeying orders, and using "dead weight" to passively resist officers.

- *Transfer and Conduct Report Hearing* -- Nelson was subsequently transferred to CCI, where a hearing was held on the conduct report written by John Doe. Nelson argued that he should not be punished for violating prison rules while experiencing a mental breakdown. Captain Franson, who was conducting the hearing, disregarded or disagreed with this argument. Franson also denied Nelson the right to call witnesses on his behalf. Nelson was adjudged guilty of violating prison rules and spent 90 days in disciplinary segregation as punishment.

OPINION

I. Eighth Amendment Deliberate Indifference Claims

The Eighth Amendment's prohibition against cruel and unusual punishment means that prison officials "must provide humane conditions of confinement . . . [and] must take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotations omitted). A prison official violates the Eighth Amendment if he acts with "deliberate indifference" to a prisoner's

---

the identities of the unnamed defendants, the court must assist the plaintiff in conducting the necessary investigation.").

exposure to a "substantial risk of serious harm." *Id.* at 834. Such a violation is present when (1) the inmate suffers an objectively intolerable risk of serious injury, and (2) the official knows of the substantial risk of harm to the inmate and intentionally fails to take reasonable steps to remedy it. *Id.*

Thus, prison officials must "provide medical care for those whom it is punishing by incarceration," because pain, suffering and injury serve no penological purpose. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Prison officials also have a recognized duty to protect prisoners from harming themselves as a result of a mental illness. *Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010); *Cavalieri v. Shepard*, 321 F.3d 616, 620-21 (7th Cir. 2003). With respect to risk of suicide in particular, a prison official may violate the Eighth Amendment if he is alerted that an inmate is at risk of suicide and fails to take reasonable steps to prevent that harm. *Cavalieri*, 321 F.3d at 620-21; *Sanville v. McCaughtry*, 266 F.3d 724, 737-39 (7th Cir. 2001).

In this case, Nelson alleges that he notified Jane Does 1 and 2 that he felt suicidal, that he had not been given his daily medication (which presumably would abate his suicidal urges), and that he needed medical assistance. He also alleges that Jane Does 1 and 2 knew that he would follow through on his suicidal ideations because he had actually attempted suicide only weeks earlier.

A prison guard is typically not required by the Eighth Amendment to "believe every profession of fear by an inmate." *Lindell v. Houser*, 442 F.3d 1033, 1035 (7th Cir. 2006). Instead, a guard is only liable if he or she is "cognizant of the *significant* likelihood that an inmate may *imminently* seek to take his own life." *Collins v. Seeman*, 462 F.3d 757,

761 (7th Cir. 2006) (emphasis added) (internal citation omitted). Given Nelson's alleged history of recent suicide attempts, his claim that he had not been medicated and expressions of suicidal thoughts, the court can reasonably infer that Jane Does 1 and 2 were aware of a significant suicide risk. Thus, their failure to seek Nelson's prescribed medication and/or medical assistance on his behalf -- and their decision to turn up the radio volume so that Nelson's calls for help could not be heard -- can also reasonably be seen as deliberate indifference. Accordingly, Nelson's Eighth Amendment claims against Jane Does 1 and 2 may proceed.

Nelson also asserts Eighth Amendment claims against John Doe and Captain Franson arising out his conduct report and subsequent conviction and punishment for causing a disruption and disobeying orders. Nelson seems to be asserting that placing him in disciplinary segregation for acts that were in some sense beyond his control (because of his mental illness) is a cruel and unusual punishment in its own right. In other words, he is challenging the prison's disciplinary regulations, which appear to hold prisoners strictly liable for their actions.

To the extent this challenge even sounds under the Eighth Amendment, it fails to state a constitutional violation. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. . . . [S]uch a standard is necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Turner v. Safley*, 482 U.S. 78, 89 (1987) (quoting *Jones v. N.C. Prisoners' Union*, 433 U.S. 119, 128 (1977)). Given the paramount importance in maintaining

safety and order in prison, and the difficulty in determining whether a prisoner's mental illness has "compelled" him to be disruptive or resist prison guards, it appears eminently reasonable for the institution to punish disruptive and disorderly conduct on a strict liability basis, as seems to be the case here.

II. Fourteenth Amendment Due Process Claims

This does not mean Nelson is wholly without remedy if his discipline was imposed without due process. A prisoner challenging the process he was afforded in a prison disciplinary proceeding must show that: (1) he has a life, liberty or property interest that the state has interfered with; and (2) the procedures he was afforded in that deprivation were constitutionally deficient. *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007).

Nelson alleges that as a result of the conduct report written by John Doe and the disciplinary hearing conducted by Captain Franson, he was sentenced to 90 days of disciplinary segregation, and thus deprived of a liberty interest. The Court of Appeals for the Seventh Circuit has explained that "a liberty interest *may* arise if the length of segregated confinement is substantial and the record reveals that the conditions of confinement are unusually harsh." *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697-98 (7th Cir. 2009) (emphasis in original). While 30 days in regular segregated confinement may not amount to a liberty interest, *Sandin v. Connor*, 515 U.S. 472, 486 (1995), it is less clear whether the same is true for Nelson's 90 day sentence. At this early stage, the court will assume that 90 days in segregation is a lost liberty interest.

This leaves the question of whether the denial of Nelson's right to call witnesses on his behalf was a deprivation of due process. Prisoners have a right to call witnesses when doing so is not "unduly hazardous to institutional safety or correctional goals." *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). It is impossible to determine on the basis of the alleged facts whether safety or correctional goals played any role in the alleged decision to deny Nelson's right to call his own witnesses, but at this early stage the court will assume that they did not. Moreover, even where a prison official justifiably refuses to allow witness testimony, he or she must at least explain the reason for this decision. *Ponte v. Real*, 471 U.S. 491, 497 (1985). The court infers that the courtesy of an explanation was not afforded to Nelson. Therefore, Nelson's procedural due process claim may proceed against Captain Franson, provided he can establish that he pursued all administrative appeals available to him from Franson's adverse ruling.

ORDER

IT IS ORDERED that:

(1) Plaintiff Kelsey Nelson's motion for leave to proceed on his claim for damages is GRANTED with respect to his Eighth Amendment claim against defendants Jane Doe 1 and 2, and his Fourteenth Amendment due process claim against Captain Franson, and DENIED in all other respects.

(2) Plaintiff is *sua sponte* GRANTED leave to proceed against Director Bryan Bartow in his official capacity for the sole purpose of determining the identity of the Doe defendants in this action.

(3) 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.

(4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows 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 plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

(6) Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 2nd day of January, 2014.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge