

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

ANTIONE O. HENRY,

Plaintiff,

OPINION AND ORDER

v.

13-cv-326-wmc

DENNIS C. WOLF, TIMOTHY CASIANA,
GLEN BENNETT, MICHAEL MEISNER,
JOANNE LANE, and (JOHN DOE) DEPUTY
WARDEN,

Defendants.

In this proposed civil action, plaintiff Antione O. Henry, also known as Antoine O'Henry,¹ alleges that correctional officer Dennis C. Wolf inappropriately touched Henry during a pat down and that the other proposed defendants failed to protect him from this inappropriate touching, all in violation of the Eighth Amendment of the United States Constitution. Henry asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Henry has provided the court, the court concluded that he is unable to prepay the full fee for filing this lawsuit. Henry also made the initial partial payment of \$8.40 required of him under § 1915(b)(1).

Because Henry is incarcerated, the next step is determining whether his proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief.

¹ While the complaint identifies plaintiff as "Antoine O'Henry," exhibits attached to the complaint, as well as state court records from plaintiff's underlying convictions indicate that plaintiff's name is actually "Antione O. Henry." So that the court may accurately refer to plaintiff, the clerk's office will correct the formal docket sheet as reflected in the case caption above.

28 U.S.C. § 1915A. For the reasons set forth below, the court finds that Henry has failed to state a claim on which relief may be granted and will deny him leave to proceed.

ALLEGATIONS OF FACT²

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Henry alleges, and the court assumes for purposes of this screening order, the following facts:

- Plaintiff Antione O. Henry, also known as Antoine O'Henry, is currently incarcerated at Kettle Moraine Correctional Institution, but for all times relevant to this complaint, he was an inmate at Columbia Correctional Institution ("CCI").
- All defendants work at CCI. Dennis C. Wolf is a correctional officer; Timothy Casiana is employed as a Captain; Glen Bennett is a head supervisor at the main kitchen; Joanne Lane is the Inmate Complaint Examiner; Michael Meisner is the warden; and the John Doe defendant is the deputy warden.
- On May 17, 2012, Henry was leaving the main kitchen after completing his work shift around 10:55 a.m. He and other inmates walked through a metal detector and then waited by a closed door. Officer Wolf "put on clubs" and said that he was conducting random searches. The inmates closest to him volunteered to be searched.
- Henry alleges that Wolf frisked several inmates and he saw him "touch a couple inmates['] penis[es] by taking his arm all the way far up the[ir] legs." (Dkt. #1-1 at p.14.)

² While Henry's complaint contains consecutive numbers at the bottom of the page, pages 3 and 4 contain the same content, and a page preceding page 3, containing paragraph 1 and the first part of paragraph 2 is missing. Henry also submitted a multi-page document titled "Material Facts." (Dkt. #1-1.) That submission contains the offender complaint he submitted as part of the administrative grievance process and includes facts which appear to be missing from his complaint. (*Id.* at pp. 14-17.) Accordingly, the court considers this submission along with the complaint.

- Henry then alleges as follows:

I was the fifth inmate. As CO Wolf search[ed] me[,] he ran his hands down my arms[,] came under them[,] went in front of my chest. As CO Wolf got to my nipple area[,] he grope[d] them[,] pinch[ed] and twist[ed] my nipples. I jump cause I was startled and me and an inmate ask why he did that at [the] same time.

(Id.)

- After searching Henry, Henry made a comment that at least he and other inmates weren't being strip searched, Wolf "looked[ed] at me, smile[d] and said 'I will strip search you.'" *(Id.)*
- Henry returned to the main kitchen later that same day for a second shift. At that time, he spoke with Bennett and reported Wolf's touching of him during the search. Bennett "laughed at me and said he [found] it hard to believe," but agreed to report it to the security director. *(Id.)* Henry reports that Bennett made him feel "humiliated, hurt, and mentally disturbed, and unprotected in his care by his actions." (Compl. (dkt. #1) p.3.)
- Around that same time, Henry observed Wolf pull up something with his face on it on his computer.
- Around 9:00 that night, several officers came to his door and told him to put on his shirt and shoes because a "white shirt" wanted to speak with him.
- Henry was escorted to a day room where he spoke with Captain Timothy Casiana. Casiana informed him that he was conducting an investigation on the earlier incident. As part of the investigation, Casiana asked Henry to tell him how Wolf touched him. He then had "the C.O. demonstrate what he did." (Compl. (dkt. #1) p.3.)³ "The officer demonstrates the search by groping his nipple area." Casiana responded that "this was the way [was] he taught to search." *(Id.)*
- On May 22, 2013, Henry filed an inmate complaint, which Joanne Lane recommended be dismissed. Warden Michael Meisner dismissed the claim. Henry alleges that (1) Lane failed to conduct a thorough investigation and (2) Meisner failed to bring in outside authorities to investigate sexual assaults. Henry also alleges that the Deputy Warden is in command of prison operations and

³ It is not clear from the complaint whether "the C.O." refers to Wolf or another correctional officer.

failed to hire adequate staff and follow policies that exist for dealing with sexual assaults.

OPINION

Henry seeks to bring claims against: (1) defendant Wolf based on his allegation that he was “sexually assaulted” in violation of the Eighth Amendment; and (2) the other named defendants for failing to protect him and for failing to conduct a thorough investigation. Both proposed claims fail to state a claim on which relief may be granted.

I. Claim Against Wolf

The Eighth Amendment’s prohibition of cruel and unusual punishment bars prison authorities from “unnecessarily and wantonly inflicting pain on inmates.” *Rivera v. Drake*, No. 12-1585, 2012 WL 6040734, at *2 (7th Cir. Dec. 5, 2012) (citing *Hope v. Pelzer*, 536 U.S. 730, 737 (2002); *Whitman v. Nesic*, 368 F.3d 931, 934 (7th Cir. 2004)). “An unwanted touching of a person’s private parts, intended to humiliate the victim or gratify the assailant’s sexual desires, can violate a prisoner’s constitutional rights whether or not the force exerted by the assailant is significant.” *Washington v. Hively*, 695 F.2d 641, 643 (7th Cir. 2012). The Seventh Circuit in *Washington* also recognized that psychological harm caused by gratuitous fondling of an inmate’s testicles and penis during a pat down was sufficient to constitute “pain” under the Eighth Amendment. *Id.* at 642.

In contrast, Henry’s allegation of inappropriate touching does not rise to this level. While Henry alleges that Wolf touched *other* inmates’ penises, he only alleges Wolf

“groped” and “pinched” his nipples. Touching of genitalia -- absent a valid penological, medical or security justification -- constitutes harassment, and possibly assault, sufficient to make out an Eighth Amendment violation, but this court could find no case law supporting such a claim based on the brief, albeit sudden and unjustified, touching of a male’s nipples. *See, e.g., Walker v. Taylorville Corr. Center*, 129 F.3d 410, (7th Cir. 1997) (finding plaintiff had alleged a sexual harassment claim under the Eighth Amendment where guard allegedly grabbed plaintiff’s penis and stroked it three or four times in addition to other verbal harassment). Even if a male’s nipples could be deemed a “private area,” the alleged touching -- a one-time groping during a pat down with other inmates nearby -- does not state a claim under the Eighth Amendment for the infliction of “pain.”⁴

To the extent Henry intended to state a constitutional claim based on Wolf’s statement that he was going to strip search him, the law is also not on his side, since mere verbal threats or harassment “are not sufficient to state a constitutional violation cognizable under § 1983.” *Pride v. Holden*, No. 92-2620, 1993 WL 299328, at *2 (7th Cir. Aug. 2, 1993) (unpublished) (affirming dismissal of Eighth Amendment claim premised on verbal harassment and threats) (citing *Patton v. Przybylski*, 822 F.2d 697,

⁴ Assuming plaintiff’s allegations were true, the alleged conduct against Henry is both unprofessional and creepy. As such, the alleged conduct should have been, and was, the subject of administrative proceedings within the Department of Corrections, but simply does not constitute “pain” under the Eighth Amendment. Given Henry’s allegations including some that might constitute sexual assault albeit against others, the court will *not* issue a strike under 28 U.S.C. § 1915(g) against Henry for the filing of this complaint.

700 (7th Cir. 1987)). Moreover, the court cannot discern a claim from Wolf's alleged review of Henry's file.

II. Claim Against Other Defendants

The court construes Henry's claim against the other defendants as a failure to protect claim in violation of the Eighth Amendment of the United States Constitution. To state such a claim, plaintiff must plead sufficient facts to allow an inference to be drawn that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994); *see also Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005). Deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997) (quotation omitted).

In light of the court's rejection of Henry's claim against Wolf, Henry's failure to protect claim also fails. Even if the court had allowed Henry to go forward on a claim against Wolf, his claims against the other defendants would still fail. Assuming Henry's May 17, 2012, oral complaint to Bennett and Bennett's subsequent communication to Casiana, along with Henry's May 22, 2012, written inmate complaint, placed defendants on notice of the alleged risk (however, minor) posed by Wolf, that notice necessarily occurred *after* the alleged sexual touching by Wolf. Accordingly, Henry fails to allege any injury suffered based on his failure to protect claim.

ORDER

IT IS ORDERED that:

- 1) plaintiff Antione O. Henry's motion for leave to proceed is DENIED;
- 2) plaintiff's claims are dismissed; and
- 3) plaintiff's other pending motion for assistance in recruitment of counsel (dkt. #5) is DENIED as moot.

Entered this 28th day of March, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge