

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

CARLOS D. LINDSEY,

Plaintiff,

v.

OPINION & ORDER

14-cv-166-jdp

LIEUTENANT DANE ESSER, and
CORRECTIONAL OFFICER RUNICE,

Defendants.

Pro se prisoner Carlos Lindsey filed a proposed complaint alleging that he was sexually assaulted by prison staff during a strip search. I screened plaintiff's complaint pursuant to 28 U.S.C. §§ 1915 and 1915A, and I granted him leave to proceed on an Eighth Amendment claim against defendants Lieutenant Dane Esser and Correctional Officer Runice. Dkt. 9. But I denied plaintiff leave to proceed against two other individuals whom he had named as defendants in his proposed complaint: Deputy Warden Hermans¹ and Captain J. Sharp. *Id.* I dismissed Sharp from this case completely, and I permitted plaintiff to amend his complaint to provide a short and plain statement of a claim against Hermans. *Id.* The deadline to amend passed without any additional filing from plaintiff, and I dismissed Hermans as well. Dkt. 14.

Plaintiff has filed three motions which I must address promptly because dispositive motions are due this week. The first is a motion to compel, Dkt. 18, in which plaintiff asks the court to order defendants to produce several documents. The second is a motion for leave to file an amended complaint. Dkt. 19. Plaintiff seeks to bring Hermans back into this case, and he proposes to add a new defendant, Security Director Jerome Sweeney. The third is a motion to adjust the schedule in this case. Dkt. 29. I will deny plaintiff's motion to compel, and I will

¹ Defendants identify this individual as "Troy Hermans." Dkt. 28, at 1. But plaintiff identifies him as "Herman." I will refer to him as Hermans.

grant his motion to file an amended complaint. I will also adjust the schedule for several deadlines in this case.

BACKGROUND

I recounted plaintiff's allegations in the July 22, 2014, screening order. Dkt. 9. But I will briefly summarize the key facts and the supplemental allegations that plaintiff provides in his proposed amended complaint. Dkt. 20.

Plaintiff is a prisoner at the Wisconsin Secure Program Facility (WSPF), located in Boscobel, Wisconsin. The defendants are Wisconsin Department of Corrections employees who work at WSPF.

On December 14, 2013, plaintiff requested to go into clinical observation. Esser directed plaintiff to turn around and prepare to be handcuffed so that he could be escorted there. After initially refusing, plaintiff eventually complied and a cell extraction team placed him in handcuffs and leg restraints. The team escorted plaintiff to the Health Services Unit, where he received medical attention for abrasions on his arms. Afterward, the team escorted plaintiff to a "strip cell." Once at the cell, Esser informed plaintiff that the team would be conducting a strip search before taking him to clinical observation. Runice then performed the strip search during which plaintiff alleges that he was sexually assaulted. After the search, Runice placed a towel around plaintiff's midsection and the extraction team took plaintiff to clinical observation without further incident.

Hermans is the deputy warden of WSPF and Sweeney is the institution's security director. Neither was present during the strip search at issue in this case. But according to plaintiff, both Hermans and Sweeney knew that Esser had a well-documented and established history of assaultive and abusive conduct toward inmates. Plaintiff notes that Esser was the

subject of several inmate complaints, although he does not explain how he knows about these complaints. Given Esser's history, plaintiff contends that Hermans and Sweeney failed to protect him from Esser and the sexual assault that occurred on December 14.

ANALYSIS

A. Plaintiff's motion to amend

Plaintiff's proposed complaint adds two new claims to this lawsuit; one against new defendants for failure to protect him from Esser, and one against the existing defendants for violating plaintiff's Fourth Amendment rights by subjecting him to an unreasonable search of his person. Under Federal Rule of Civil Procedure 15(a)(2), courts must "freely give leave [to amend a complaint] when justice so requires." But I may deny a motion to amend "in the case of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment." *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010) (internal citations and quotation marks omitted). Here, defendants principally contend that plaintiff's motion is untimely and that an amended complaint will unduly prejudice them. Defendants also contend that the proposed amendments are futile because, even accepting plaintiff's new allegations as true, he does not state a claim against Hermans and Sweeney for failure to protect him from Esser, or a claim against Esser and Runice for an unreasonable search. Plaintiff's motion was arguably late, but not unduly so. Moreover, his proposed claims are not futile, and so I will grant him leave to amend.

1. Delay and prejudice to defendants

Defendants first assert that the delay in plaintiff's motion to amend will be unduly prejudicial given how far this case has already progressed. Defendants suggest that plaintiff's

proposed complaint comes after the deadline for disclosure of expert witnesses and “on the eve” of the deadline for summary judgment motions. Dkt. 28, at 4. But plaintiff filed his motion to amend on January 26, 2015, Dkt. 19, a month before the deadline for his expert witness disclosures, two months before defendants’ deadline for expert witness disclosures, and just under three months before the deadline for dispositive motions, *see* Dkt. 16. Defendants also protest that adding two new claims and two new defendants will cause this case to “essentially start over.” Dkt. 28, at 5. But plaintiff’s new allegations do not drastically alter the scope of this lawsuit. At issue is whether WSPF employees conducted an improper strip search on December 14, 2013. And although adding Hermans and Sweeney will require defendants to ascertain whether these officials were deliberately indifferent to a risk that plaintiff’s rights would be violated, most (if not all) of the information necessary to make that determination is already within defendants’ control.

Defendants are correct that plaintiff has offered no explanation for waiting so long to file his motion to amend, and that this delay is particularly prominent with regard to Hermans, who was named in plaintiff’s original complaint. Although I am sympathetic to defendants’ frustration, their concerns can be easily remedied with an adjustment to the schedule in this case. I will therefore provide defendants with time to identify additional expert witnesses, and I will extend the deadline by which the parties may file motions for summary judgment on the merits of plaintiff’s claims. I will also give defendants a brief window in which to present a motion for summary judgment for failure to exhaust administrative remedies on plaintiff’s newly added claims. If these measures are inadequate, defendants are free to seek additional relief.

2. Failure to protect claim

To properly state a claim for failure to protect, plaintiff “must establish: (1) that he was ‘incarcerated under conditions posing a substantial risk of serious harm’ and (2) that the

defendants acted with ‘deliberate indifference’ to his health or safety.” *Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). “The deliberate indifference test therefore has both objective and subjective prongs, the former requiring a grave risk and the latter requiring actual knowledge of that risk.” *Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008). Plaintiff’s allegations, accepted as true, adequately explain how Hermans and Sweeney had knowledge of a substantial risk that Esser posed, and how the officials failed to protect plaintiff from that risk.

Plaintiff contends that Esser violated his Eighth Amendment rights by denying him an opportunity to have a visual strip search instead of a staff-assisted search, and that Runice violated plaintiff’s Eighth Amendment rights by conducting an improper strip search.² Dkt. 9, at 5. Plaintiff now proposes to add a claim against Hermans and Sweeney for failing to protect him from these alleged constitutional violations. His basis for doing so is that other inmates at WSPF have used the inmate complaint system to report Esser’s “assaultive abusive conduct toward inmates by abusing his discretion as a lieutenant.” Dkt. 20, at 3.³ Because I must construe this allegation as true, and because I must draw all reasonable inferences from this allegation in plaintiff’s favor, I conclude that plaintiff’s proposed claim is not futile.

The Seventh Circuit has “held that failure to provide protection constitutes an Eighth Amendment violation only if deliberate indifference by prison officials to a prisoner’s welfare effectively condones the attack by allowing it to happen.” *Santiago*, 599 F.3d at 756 (internal citations and quotation marks omitted). To borrow an analogy from the court of appeals:

² Implicit in these claims is the issue of whether Esser failed to intervene once he saw that Runice was performing an improper strip search.

³ Plaintiff also indicates that Esser’s job title and ability to discipline inmates contributed to Hermans and Sweeney’s knowledge that Esser posed a risk to plaintiff. Without further clarification, this vague assertion is insufficient.

If [prison officials] place a prisoner in a cell that has a cobra, but they do not know that there is a cobra there (or even that there is a high probability that there is a cobra there), they are not guilty of deliberate indifference even if they should have known about the risk, that is, even if they were negligent—even grossly negligent or even reckless in the tort sense—in failing to know. . . . But if they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference.

Billman v. Ind. Dep't of Corr., 56 F.3d 785, 788 (7th Cir. 1995).

Defendants contend that plaintiff's allegations, even if true, "do not suggest that he was 'almost certain' or 'very likely' to suffer serious harm at the hands of Runice and/or Esser." Dkt. 28, at 6. Defendants emphasize that the inmate complaints to which plaintiff alluded did not articulate a "'sufficiently imminent' risk that [plaintiff] would be sexually assaulted by *any* staff at WSPF, much less Runice." *Id.* (original emphasis). Strictly speaking, defendants are correct; plaintiff's proposed amended complaint does not discuss the specific contents of these complaints. But this argument is nevertheless unpersuasive because it ignores Esser's role in the alleged sexual assault.

Plaintiff alleges that inmates routinely complained that Esser abused his discretion as a lieutenant. According to the complaint, Esser's decision to forgo asking plaintiff to consent to a visual search gave rise to the alleged sexual assault. Plaintiff's case is therefore analogous to those in which inmates claim that prison officials have failed to protect them from assaults by other inmates. In that context, "a deliberate indifference claim may be predicated on custodial officers' knowledge that a specific individual poses a heightened risk of assault to even a large class of detainees—notwithstanding the officials' failure or inability to comprehend in advance the particular identity of this individual's ultimate victim." *Brown v. Budz*, 398 F.3d 904, 915 (7th Cir. 2005); *see also Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008) ("The precise identity of the threat, be it a cobra or a fellow inmate, is irrelevant. A prison official cannot escape

liability by showing that he did not know that a plaintiff was especially likely to be assaulted by the specific prisoner who eventually committed the assault.”) (internal citations and quotation marks omitted). I must accept as true plaintiff’s allegation that the inmate complaints warned Hermans and Sweeney that Esser frequently abused the discretion afforded to him at the expense of WSPF inmates. From this allegation, it is reasonable to infer that Hermans and Sweeney knew of at least a “high probability” that Esser would continue to exercise his discretion in a way that would allow inmates to be harmed. It is further reasonable to infer that one such exercise of discretion would involve deciding whether to afford inmates the opportunity to consent to a visual strip search.⁴

I will grant plaintiff leave to amend his complaint and include a claim against Hermans and Sweeney for failure to protect him from Esser and the alleged sexual assault in this case. But I note that plaintiff’s claim rests upon several significant inferences, and I will warn plaintiff that he will no longer be entitled to rely on mere inference once he has completed discovery; he will have to provide *evidence* to support his claims. First, to succeed on any claim under 42 U.S.C. § 1983, plaintiff must demonstrate that each defendant was personally involved in a deprivation of his constitutional rights. *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001). Thus, plaintiff cannot merely rely on the fact that Hermans and Sweeney were supervisory personnel in charge of implementing WSPF procedures or monitoring WSPF staff. With regard to inmate complaints about Esser’s past abuses of discretion, for example, plaintiff will eventually have to provide evidence that Hermans and Sweeney reviewed these complaints or otherwise learned of them.

⁴ It is immaterial that the alleged inmate complaints did not warn of Runice sexually assaulting plaintiff or other inmates. I understand plaintiff’s claim against Hermans and Sweeney to allege that they failed to protect him from *Esser*, not Runice.

Plaintiff will also have to provide evidence from which a reasonable jury could conclude that the inmate complaints were sufficient to put Hermans and Sweeney on notice that Esser had a propensity for abusing his discretion and for allowing inmates to be assaulted; threadbare allegations about these complaints will not suffice. But these are problems for another day. At this point, plaintiff has alleged facts which, if true, could support a claim against Hermans and Sweeney for failure to protect him from Esser's abusive exercises of discretion.

3. Fourth Amendment claim

Plaintiff has also alleged facts that would entitle him to relief on a Fourth Amendment claim against Esser and Runice. “[T]he Fourth Amendment protects, to some degree, prisoners’ bodily integrity against unreasonable intrusions *into* their bodies. *King v. McCarty*, No. 13-1769, 2015 WL 1396611, at *9 (7th Cir. Mar. 27, 2015) (original emphasis). Defendants contend that plaintiff has not alleged an intrusion into his body, and they therefore argue that any Fourth Amendment claim would be futile. Dkt. 28, at 7. But defendants overlook several factual allegations in plaintiff’s initial complaint and in his proposed complaint. These allegations *do* allege that Runice unreasonably intruded into plaintiff’s body, and so I conclude that plaintiff’s proposed Fourth Amendment claim is not futile.

In his initial complaint, plaintiff described a sexual assault in which Runice: (1) pinched plaintiff’s buttocks; (2) “stuck his finger inside plaintiff Lindsey[’s] buttocks;” and (3) swiped his fingers between plaintiff’s legs, “tight up by w[h]ere plaintiff Lindsey[’s] cro[t]ch” was. Dkt. 1, ¶¶ 23-24. Plaintiff’s proposed amended complaint repeats this narrative. Dkt. 20, at 2. True, these allegations are distinguishable from cases in which courts have found viable Fourth Amendment claims. *C.f. Sanchez v. Pereira–Castillo*, 590 F.3d 31, 44-48 (1st Cir. 2009) (prisoner stated a Fourth Amendment claim based on abdominal surgery used to search for evidence); *Sparks v. Stutler*, 71 F.3d 259, 261 (7th Cir. 1995) (the use of a catheter on inmates is subject to

Fourth Amendment protection). But *King*, the very case that defendants cite to oppose plaintiff's motion to amend, noted that the Fourth Amendment "protect[s] some degree of privacy for convicted prisoners, at least when it comes to bodily searches, even if that protection is significantly lessened by punitive purposes of prison and the very real threats to safety and security of prisoners, correctional staff, and visitors." 2015 WL 1396611, at *10. Indeed, the Supreme Court has recognized a distinction between strip searches that involve touching and searches that are merely visual, holding that the latter do not implicate Fourth Amendment concerns. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1523 (2012) ("There also may be legitimate concerns about the invasiveness of searches that involve the touching of detainees. These issues are not implicated on the facts of this case, however, and it is unnecessary to consider them here."). Plaintiff has alleged an improper strip search that involved not only physical contact, but also at least some intrusion into his body. He may therefore proceed with a claim against Esser and Runice for violating his Fourth Amendment rights by performing an unreasonable search of his person.

B. Plaintiff's motion to compel

Plaintiff has moved to compel production of four categories of documents that he requested from defendants. The motion to compel encompasses: (1) plaintiff's complete prison record; (2) all written statements, originals or copies, identifiable as records about the incident on December 14, 2013, that were made by DOC employees or witnesses; (3) any and all psychological files or records about the incident on December 14, 2013; and (4) any and all Division of Adult Institutions rules, regulations, policies, and procedures. Dkt. 18, at 1. Defendants responded to plaintiff's requests, objecting to all four of them, but agreeing to make responsive documents available for requests two and four. Defendants now oppose plaintiff's motion to compel on the grounds that their objections were valid and that plaintiff has not

narrowed his requests in light of those objections. Defendants' arguments are persuasive, and I will deny plaintiff's motion to compel.

Defendants first address whether they have an obligation to pay for photocopies of the documents that plaintiff requests. They characterize plaintiff's motion as objecting "to having to make copies of these documents at his own expense." Dkt. 22, at 2. But plaintiff's motion does not appear to present such a request. *See* Dkt. 18. He merely asks the court to compel defendants "to produce for inspection and copying," the above-mentioned documents. *Id.* at 1. Nevertheless, if plaintiff intended to request that defendants pay for photocopies of the documents that he seeks, then that request is denied. Civil litigants, even pro se prisoners proceeding *in forma pauperis*, do not have a right to government assistance with their discovery efforts. *See Miller v. Cox*, No. 08-cv-44, 2008 WL 2810595, at *2 (W.D. Wis. July 21, 2008) ("Defendant responded that plaintiff was free to look at his own medical records and make copies at 15¢/page; similarly . . . plaintiff was free to review [Wis. Admin. Code DOC] § 316 and other documents in the prison law library and make his own copies at his own expense. This is a completely adequate response to both requests. Plaintiff is not entitled to anything else."); *Stewart v. Barr*, No. 05-cv-293, 2005 WL 6166745, at *2 (W.D. Wis. Nov. 30, 2005) ("[D]efendants have no obligation to provide plaintiff with free copies of his medical records.").

Defendants objected to requests one, two, and four on the grounds that plaintiff's requests were ambiguous and called for speculation as to what documents plaintiff was requesting.⁵ Defendants further objected to requests one and four on the grounds that they were overly broad, unduly burdensome, and unlikely to lead to the discovery of admissible evidence.

⁵ Subject to these objections, defendants agreed to produce responsive documents for request two. For request four, defendants informed plaintiff that he could access Wisconsin statutes, administrative codes, and DAI policies and procedures through the law library at WSPF.

Finally, defendants objected to request three on the grounds that they did not have proper medical authorization from plaintiff to obtain responsive documents. These objections were valid, and plaintiff must clarify or narrow the scope of his requests for documents. *See* Fed. R. Civ. P. 34(b) (“The request . . . must describe *with reasonable particularity* each item or category of items to be inspected.”) (emphasis added).

For request one, plaintiff does not explain why his *entire* prison record is necessary or relevant to this case. Although plaintiff correctly observes that the standard for relevance is low (especially in the context of discovery), plaintiff must at least minimally articulate why he needs these documents; “[d]iscovery is not to be used as a fishing expedition.” *Cent. States, Se. & Sw. Areas Pension Fund v. Waste Mgmt. of Mich., Inc.*, 674 F.3d 630, 637 (7th Cir. 2012) (quoting *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 971 (7th Cir. 1996)).

For requests two and four, defendants will permit plaintiff to make photocopies of responsive documents and materials from the law library. If plaintiff contends that defendants have misunderstood the scope of his requests, he may clarify which documents he seeks.

For request three, plaintiff authorized a limited release of his medical records, and so defendants cannot obtain—let alone produce—documents that are beyond the scope of that authorization. Plaintiff expressly gave defendants permission to obtain “psychological or and psychiatric files from 12/15/13 through 12/30/13.” Dkt. 23-2, at 2. Plaintiff further wrote that “[a]s for any other records[,] they do not pertain to this civil action.” *Id.* Given plaintiff’s own assertion that these medical records are not relevant to this case, he cannot now pursue discovery of them. Moreover, defendants cannot produce what they cannot obtain.

C. Plaintiff’s motion to adjust the schedule

Plaintiff has moved to extend the deadline for dispositive motions on the merits of his claims. Because I will grant plaintiff leave to amend his complaint, I will also adjust the schedule

for this case. Defendants will have an opportunity to move for summary judgment on the grounds that plaintiff has failed to exhaust his administrative remedies on these new claims (I will not revive this deadline with regard to plaintiff's existing Eighth Amendment claims against Esser and Runice). The parties may also have additional time to prepare their summary judgment motions on the merits for *all* of plaintiff's claims—new and old. Finally, I will permit the parties to supplement their expert witness disclosures if they determine that additional expert testimony is necessary in light of the new claims.

The new schedule will be as follows:

- Dispositive motions for failure to exhaust administrative remedies on the newly added claims will be due on April 24, 2015.
- Plaintiff's amended expert witness disclosures, if any, will be due on April 24, 2015, and defendants' amended expert witness disclosures, if any, will be due on May 26, 2015.
- Dispositive motions on the merits of all claims will be due on June 15, 2015.

The other deadlines in this case remain in place, and the trial will begin on November 2, 2015, at 9:00 am.

ORDER

IT IS ORDERED that:

1. Plaintiff Carlos Lindsey's motion to compel, Dkt. 18, is DENIED.
2. Plaintiff's motion for leave to file an amended complaint, Dkt. 19, is GRANTED. Plaintiff may proceed against defendants Lieutenant Dane Esser and Correctional Officer Runice with his Fourth Amendment claim for an unlawful search. Plaintiff may also proceed against defendants Deputy Warden Hermans and Security Directory Sweeney with his Eighth Amendment claim for failure to protect him from Esser.
3. The state may have 21 days to file an answer to the amended complaint for all defendants whom it chooses to represent.

4. The schedule for this case is amended, as indicated above. All deadlines that are not specifically amended in this Order remain in effect.

Entered April 14, 2014.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge