

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

OSCAR GARNER,

Plaintiff,

v.

OFFICER KIRBY,

Defendant.

OPINION & ORDER

14-cv-545-jdp

Pro se plaintiff Oscar Garner is incarcerated at the Wisconsin Secure Program Facility (WSPF). He has filed a proposed civil action under 42 U.S.C. § 1983, alleging that a prison employee sexually assaulted him during a pat-down search, in violation of plaintiff's Eighth Amendment rights.¹

Plaintiff has paid an initial partial payment of the filing fee as previously directed by the court. Accordingly, the next step in this case is for the court to screen the 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. 28 U.S.C. §§ 1915 & 1915A. In screening 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). After reviewing the complaint with this principle in mind, I will allow plaintiff to proceed with his Eighth Amendment claim.

¹ Plaintiff has moved to amend his complaint. Dkt. 15. The court will grant his motion, making plaintiff's amendment complaint, Dkt. 16, the operative pleading in this case.

ALLEGATIONS OF FACT

In his complaint, plaintiff alleges the following facts. On December 5, 2012, plaintiff was housed in segregation at the Waupun Correctional Institution (WCI). On the way out to recreation, plaintiff was searched and was not found to have contraband. On the way back in from recreation, defendant Officer Kirby handcuffed plaintiff and began patting him down. Plaintiff alleges that Officer Kirby sexually assaulted him during the pat-down search by “caressing [his] genitals going up and down and grabbing Garner’s testicles through [his] pants for about 3 minutes maybe 4 minutes.” Dkt. 16, at 1. When plaintiff protested, Officer Kirby said “that’s nice” and made a comment to the effect of “it’s true about size.” *Id.* An unnamed officer came in and told Officer Kirby to put plaintiff back in the “cage,” which he then did. Officer Kirby then patted down another inmate, similarly assaulting him until the unnamed officer again told Officer Kirby to put the inmate back in the cage, then excused Officer Kirby to go to the sergeant office, and proceeded to escort all of the inmates herself.

The day after the incident, plaintiff spoke with Dr. Endres about the subsequent difficulty he was having. Dr. Endres told him that he was “going overboard with the situation and [he] should calm down and get over it, it’s protocol to do pat searches.” Dkt. 1, at 5. Plaintiff filed a complaint about the incident using an ICE form, numbered WCI-2012-25208. His complaint was dismissed with modification. Someone interviewed plaintiff about the incident, presumably in connection with an investigation, but he never signed a statement. On December 7, 2012, plaintiff wrote the security director to ask whether any video taken at the time of the incident could be saved, but he never received an answer. Plaintiff also wrote to the records office on March 7, 2013, asking for copies of reports from the incident, but he received a response that there were no reports of the incident. The

security director wrote to plaintiff on August 5, 2013, and told him that if the records office told him that there were no records, then there was nothing that the security officer could do for him. Plaintiff filed another complaint, numbered WCI-2012-15208, and wrote to the records office at WSPF on October 16, 2013. The next day, the records office at WSPF referred him to staff at WCI for the information. He then wrote to staff at WCI on October 17, 2013, requesting the investigation materials, but he received no answer.

ANALYSIS

Plaintiff brings an Eighth Amendment claim under 42 U.S.C. § 1983 against Officer Kirby for sexually assaulting him during a pat-down search. To state a claim for relief under 42 U.S.C. § 1983, plaintiff must allege that: (1) he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was done by a person or persons acting under color of state law. *Buchanan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009).

The Eighth Amendment protects prisoners from cruel and unusual punishment, which includes conduct that is “intended to humiliate the victim or gratify the assailant’s sexual desires.” *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012). But “only those searches that are maliciously motivated, unrelated to institutional security, and hence totally without penological justification are considered unconstitutional.” *Whitman v. Nescic*, 368 F.3d 931, 934 (7th Cir. 2004), *as amended*, (June 4, 2004) (internal quotation marks and citations omitted). Thus, to prove his claim, plaintiff must allege facts from which a reasonable jury may infer that Officer Kirby conducted the pat-down search maliciously, to humiliate or

harass him for reasons unrelated to prison needs. *See Meriwether v. Faulkner*, 821 F.2d 408, 418 (7th Cir. 1987).

Plaintiff has alleged that the pat-down search included “caressing” and “grabbing” his genitals. He also contends that it lasted for three to four minutes and that Officer Kirby responded to his protests by “smiling and smirking” and commenting that “it’s true about size.” Although pat-down searches to check for contraband in prison settings are often justified, *see Gillis v. Pollard*, 554 F. App’x 502, 506 (7th Cir. 2014), the facts alleged in plaintiff’s complaint raise an inference that defendant Officer Kirby conducted the pat-down search in a way that exceeded any penological justification. Therefore, I will allow plaintiff to proceed with his Eighth Amendment claim.

ORDER

IT IS ORDERED that:

1. Plaintiff Oscar Garner’s motion to amend his complaint, Dkt. 15, is GRANTED. The amended complaint at Dkt. 16 will be the operative pleading in this case.
2. Plaintiff is GRANTED leave to proceed on an Eighth Amendment sexual assault claim against defendant Officer Kirby.
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 defendant. Plaintiff should not attempt to serve defendant on his own at this time. 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 defendant.
4. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer or lawyers who will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents

plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's 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 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). 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 accounts until the filing fee has been paid in full.

Entered December 7, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge