

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

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HERMAN BROWN, JR.,

Plaintiff,

v.

CAPTAIN BOODRY, SERGEANT J. KOTTKA,  
C.O. BENEVETZ, C.O. JOHNSON  
and C.O. PARENTEAU,

Defendants.  
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OPINION AND ORDER

14-cv-171-bbc

In this civil action, pro se plaintiff Herman Brown, Jr., a prisoner at the Columbia Correctional Institution, contends that he was sexually assaulted during a strip search in violation of the Eighth Amendment. A court in the Eastern District of Wisconsin transferred the case to this court after screening plaintiff's complaint and denying him leave to proceed for failure to allege that a particular defendant assaulted him. This court then screened plaintiff's amended complaint and denied him leave to proceed because he had failed to adequately explain the factual basis for his claims, in violation of Fed. R. Civ. P. 8. Plaintiff has since filed a second amended complaint, which is ready for screening under 42 U.S.C. § 1915A. Dkt. #25. Plaintiff has also renewed his motion for assistance in recruiting counsel. Id.

Plaintiff alleges the following facts in his second proposed amended complaint.

## ALLEGATIONS OF FACT

On July 3, 2013, unnamed correctional officers escorted plaintiff from Unit 2 in the Columbia Correctional Institution to the segregation unit. During this process the officers would not allow plaintiff to turn his head to observe who they were or what names were on their identification tags. They took plaintiff to the shower in the segregation unit. Defendants Captain Boodry and Sergeant J. Kottka and an unknown third correctional officer were all present in the shower room. One of them cut off plaintiff's clothes. One of them "grabbed" plaintiff's penis and "move[d] it around" and then spread open plaintiff's buttocks. Plt's Second Am. Cpt., dkt. #25, at 1-2. During this time, plaintiff's head was pushed up against the shower door so he could not see who was touching him.

After plaintiff entered the segregation unit, he was charged the cost for fixing a window that was already scratched.

When prison staff members conduct searches of plaintiff's cell, they have been going through plaintiff's legal papers and taking some of his legal documents.

Some time after plaintiff filed his lawsuit, defendant Kottka and correctional officer Gerry "slam[med] him to the floor," and Kottka "had an outside case put on [plaintiff]." Id. at 3. (Plaintiff lists correctional officers Kearns, Sandra Ashton and Roeker in this section of his complaint but he does not explain what role if any they played in this incident.)

## OPINION

### A. Strip Search

Plaintiff says he was “sexually assaulted” during a strip search. “[T]o state an Eighth Amendment claim [plaintiff] must show that the strip search in question was not merely a legitimate search . . . , but instead a search conducted in a harassing manner intended to humiliate and inflict psychological pain.” Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003). Moving from one unit of the prison to another presents security concerns, so it would be difficult for plaintiff to show that the strip search was not undertaken for penological reasons. Cf. Peckham v. Wisconsin Department of Corrections, 141 F.3d 694, 695 (7th Cir. 1998) (random strip searches of all inmates in cell block and strip searches of those who had contact with nonprisoners do not violate Eighth Amendment if not done in harassing manner). However, this court has held that correctional officers may not conduct manual strip searches when a visual one would suffice, given the safety and penological concerns of the particular situation. Vasquez v. Raemisch, 480 F. Supp. 2d 1120, 1131-32 (W.D. Wis. 2007) (granting leave to proceed on manual strip search when officers did not give plaintiff opportunity to consent to visual search and no allegations indicate legitimate reason preventing visual inspection). Because plaintiff says he was pushed against the shower door and thus given no opportunity to take his clothes off on his own or otherwise to have a visual search, his claim may proceed.

However, plaintiff’s amended complaint does not list the defendants in his case. His previous complaint listed defendants Kottka and Boodry as well as correctional officers

Benevetz, Johnson and Parenteau, so they are the current defendants in this case. Because plaintiff discusses only defendants Kottka and Boodry in his most recent complaint, I am dismissing the complaint as to defendants Benevetz, Johnson and Parenteau. If plaintiff wishes to add a John Doe defendant, he may file another amended complaint that includes a list of all defendants he intends to sue and alleges all the facts necessary to state his claims against each defendant.

### B. Additional Claims

In his second amended complaint, plaintiff alleges several new facts. Plaintiff alleges that defendant Kottka and a correctional officer named Gerry “slammed” him on the ground after he filed this lawsuit. Because plaintiff alleges that he suffered physical violence for exercising his right to access the courts and for a non-penological reason, he has stated both a retaliation claim and another Eighth Amendment excessive force claim. Kaufman v. Schneider, 474 F. Supp. 2d 1014, 1023 (W.D. Wis. 2007) (“To state a retaliation claim, a prisoner must allege that he engaged in constitutionally protected conduct and that his protected actions prompted one or more prison officials to take adverse action against him.”); Whitley v. Albers, 475 U.S. 312, 320 (1986) (excessive force applied when it is not “a good faith effort to maintain or restore discipline or [when applied] maliciously and sadistically for the very purpose of causing harm.”).

Correctional officer Gerry has not been added to this case as a defendant because he has never been named as a defendant in a caption. If plaintiff intends to sue Gerry as well,

he must file another amended complaint with a caption that lists Gerry (along with all other defendants he intends to sue) and alleges all facts necessary to state his claims. Furthermore, although plaintiff lists correctional officers Kearns, Sandra Ashton and Roeker in the context of these allegations, plaintiff does not make any coherent allegations against them, so he has not stated a claim against them and they will not be added to the case as defendants. If plaintiff intends to sue these correctional officers, he must also explain their role in his claims.

Plaintiff also says Kottka “had an outside case put on [him].” Plt.’s Second Am. Cpt., dkt. #25, at 3. It is not clear what plaintiff means by this allegation. To the extent plaintiff is attempting to allege that Kottka took an adverse action against plaintiff as a result of his lawsuit, plaintiff would state a retaliation claim. Kaufman, 474 F. Supp. 2d at 1023. However, should plaintiff wish to pursue this claim, he would need to amend his complaint to explain what Kottka did.

Plaintiff says his legal papers have been searched through and taken away during searches of his cell. Plaintiff does not have any Fourth Amendment protection against searches of his prison cell, so he cannot state a claim on that ground. Hudson v. Palmer, 468 U.S. 517, 526 (1984). He may be attempting to state a claim for denial of access to the courts, but he has failed to do so because he has not alleged an actual injury that resulted from the prison staff’s conduct. Lewis v. Casey, 518 U.S. 343, 351 (1996) (injury cannot be theoretical). He also fails to state a retaliation claim because he does not explain who conducted the cell searches or for what purpose. In addition, he does not explain how or

whether the searches are related to plaintiff's claims in this case. Unless plaintiff's claims about the cell search share defendants or common facts with plaintiff's claims about the strip search or assault, adding them would violate Fed. R. Civ. P. 20.

Next, plaintiff alleges that he was charged the cost of fixing a scratched window, even though he did not do anything to damage the window. Plaintiff does not explain who charged him (and thus who the defendant should be), and he does not explain whether he received any process before being charged, so he has failed to state a claim. Hannemann v. Southern Door County School District, 673 F.3d 746, 752 (7th Cir. 2012) (due process claims requires showing that person was deprived of right, process was due before deprivation and process was not received). Furthermore, plaintiff does not explain how this incident is related any of his other claims. He does not say whether the defendants would be the same and he has not stated any questions of fact or law that would be common to this claim and to his other claims, so adding it would violate Fed. R. Civ. P. 20.

### C. Renewed Motion for Assistance in Recruiting Counsel

Plaintiff again asks for "assignment" of counsel, which I construe as a motion for assistance in recruiting counsel because I have no authority to compel a lawyer to handle a case. Plaintiff provides no new reasons for granting this motion. Like his previous motion, this one comes too early in his case to determine whether he will require counsel. Pruitt v. Mote, 503 F.3d 647, 663 (7th Cir. 2007). Thus, his motion will be denied.

## ORDER

IT IS ORDERED that

1. Plaintiff Herman Brown, Jr. is GRANTED leave to proceed on his claims in his second amended complaint, dkt. #25, that (1) defendants Captain Boodry and Sergeant Kottka conducted an inappropriate manual strip search, in violation of the Eighth Amendment; (2) defendant Kottka used excessive force when he slammed plaintiff to the ground; and (3) defendant Kottka retaliated against plaintiff when he slammed plaintiff to the ground after learning of plaintiff's lawsuit.

2. Plaintiff's complaint is DISMISSED with respect to the following claims, as a result of plaintiff's failure to allege sufficient facts to state a claim under Fed. R. Civ. P. 8: (1) his retaliation claim for an "outside case"; (2) his claims related to searches of plaintiff's cell; and (3) his claims related to receiving discipline for scratching his window.

3. Defendants C.O. Benevetz, C.O. Johnson and C.O. Parenteau are DISMISSED from this case.

4. Plaintiff's motion for assistance in recruiting counsel, dkt. #25, is DENIED.

5. For the time being, plaintiff must send defendants Boodry and Kottka a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

6. 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.

7. 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 defendants. Plaintiff should not attempt to serve defendants 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 defendants.

8. Plaintiff is obligated to pay the unpaid balance of his filing fees 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 this 16th day of May, 2014.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge