

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

CARLOS D. LINDSEY,

Plaintiff,

v.

ORDER

14-cv-357-jdp

LIEUTENANT DANE ESSER, and
CORRECTIONAL OFFICER TAYLOR,

Defendants.

Pro se prisoner Carlos Lindsey has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that defendants Lieutenant Esser and Correctional Officer Taylor failed to turn the water back on in plaintiff's cell after a routine search, in violation of the Eighth Amendment. After screening plaintiff's initial complaint, Dkt. 1, I denied him leave to proceed but permitted him to amend his complaint. Plaintiff has since filed a proposed amended complaint, Dkt. 6, which I must again screen under 28 U.S.C. §§ 1915 and 1915A, giving liberal construction to his pleadings. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After reviewing plaintiff's submissions, I now conclude that he has provided a short and plain statement of a claim against the defendants for violating his Eighth Amendment rights. I will therefore grant plaintiff leave to proceed.

Under Fed. R. Civ. P. 8, a plaintiff must present "a short and plain statement of the claim showing that [he] is entitled to relief." The purpose of the requirement is "to provide the defendant with 'fair notice' of the claim and its basis." *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011). In this case, plaintiff alleges that Esser and Taylor were responsible for creating unsanitary conditions in his cell. Beginning on April 9, 2014, plaintiff was unable to flush the toilet in his cell for five days. He did not have access to another toilet during this time. Plaintiff alleges that Esser had the water turned off in plaintiff's cell for a routine search, but failed to

have central control restore it after the search. Plaintiff also alleges that he informed Taylor about the problem when she came by his cell to deliver medication, but that she ignored him.

I initially denied plaintiff leave to proceed because it was unclear from his complaint the extent to which his lack of running water created unsanitary conditions. Dkt. 5. He did not explain, for example, whether he was forced to use the non-functional toilet or if he had access to other bathroom facilities. I also concluded that plaintiff could not simply rely on the odor in his cell, as “[o]rdinarily, mere exposure to unpleasant odors does not constitute an Eighth Amendment violation.” *Lewis v. Pollard*, No. 11-cv-280, 2013 WL 1305841, at *6 (E.D. Wis. Mar. 28, 2013) (citing *Sain v. Wood*, 512 F.3d 886 (7th Cir. 2008)). Although plaintiff again does not go into great detail about the conditions in his cell, his amended complaint alleges that he was forced to use a non-flushing toilet for five days and that plaintiff did not have access to other restroom facilities. I conclude that these allegations, if true, could give rise to a violation of plaintiff’s Eighth Amendment rights. *See Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989) (“Prison officials have a responsibility to provide inmates with a minima of shelter, sanitation and utilities-basic necessities of civilized life.”). Plaintiff has therefore complied with Rule 8’s requirement of providing a short and plain statement of a claim, and I will grant him leave to proceed against Esser and Taylor on these Eighth Amendment claims.

In the first screening order, I noted that plaintiff may also be able to assert a First Amendment claim of retaliation against Esser. Plaintiff’s initial complaint suggested that Esser may have intentionally kept the water off because plaintiff had recently filed a civil action against Esser for another matter. I directed plaintiff to “allege what basis, if any, he has for believing that his first lawsuit was a ‘motivating factor’ for Esser’s actions.” Dkt. 5, at 5. Plaintiff’s amended complaint does not discuss Esser’s motivations or mention the first lawsuit, so I conclude that plaintiff has elected not to pursue a First Amendment claim against Esser.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Carlos Lindsey is GRANTED leave to proceed on his Eighth Amendment claims against defendants Lieutenant Esser and Correctional Officer Taylor for the unsanitary conditions created by his non-functioning toilet;
- 2) 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;
- 3) For the time being, plaintiff must send defendants 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;
- 4) 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; and
- 5) 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 account until the filing fee has been paid in full.

Entered this 12th day of August, 2014.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge