

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

RICHARD LEWIS,

Plaintiff,

v.

OPINION & ORDER

15-cv-51-jdp

EDWARD WALLS, MICHAEL STEPHEN,
THEODRE ANDERSON, BRYAN GERRY, and
ANDREW MILLER,

Defendants.

Pro se prisoner Richard Lewis has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that defendants violated his Fourth and Eighth Amendment rights by subjecting him to an improper strip search. Dkt. 1. According to plaintiff, defendants conducted a staff-assisted strip search in plain view of other inmates, and during the search, one of the guards improperly inserted a finger into plaintiff's anus.

Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1). The next step in this case is for me to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for monetary 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, I 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 conclude that plaintiff has stated Fourth and Eighth Amendment claims against all but one of the defendants. I will therefore grant plaintiff leave to proceed on these claims, but I will dismiss the one defendant for whom plaintiff has not alleged any personal involvement.

ALLEGATIONS OF FACT

Plaintiff is an inmate at the Columbia Correctional Institution (CCI), located in Portage, Wisconsin. Defendants Michael Stephen, Theodore Anderson, Bryan Gerry, and Andrew Miller are correctional officers and administrators at CCI. Defendant Edward Wall is the secretary of the Wisconsin Department of Corrections.¹

Plaintiff was confined in the segregation unit at CCI on October 17, 2014, when he indicated to staff that he intended to harm himself by standing on his cell sink with a bed sheet tied around his neck. Gerry responded, and after a short conversation, plaintiff came down from the sink and removed the sheet from his neck. Anderson arrived at plaintiff's cell as he was coming down from the sink, and he ordered plaintiff to come to the cell door to be restrained and transported to the shower area for a strip search.

Plaintiff does not explain exactly what happened in the shower area, but he apparently refused staff instructions to come out of the shower. Plaintiff told CCI staff that he was "going to make [them] suit up and gas and taze [him]." Dkt. 1, ¶ 3. Anderson directed Miller, Gerry, and Stephen to conduct a "staff-assisted" strip search. Gerry and Miller placed plaintiff against a wall as Stephen cut plaintiff's clothing off and conducted the strip search. As part of the search, Stephen used his hands to spread plaintiff's buttocks apart. Stephen also inserted a finger "inside [plaintiff]'s buttocks." *Id.* ¶ 6. According to plaintiff, the search occurred in an open area that other inmates could see by looking out of their cell windows. Stephen did not find any contraband during the search. Afterward, CCI staff escorted plaintiff back to his cell and placed him on observation status.

¹ Plaintiff's complaint incorrectly identifies the secretary as "Edward Walls." Dkt. 1, ¶ 9.

ANALYSIS

I understand plaintiff to assert two constitutional violations in this case: the first is a Fourth Amendment claim for an unreasonable search of his person, and the second is an Eighth Amendment claim for violating his right to be free from cruel and unusual punishment. Plaintiff has alleged an unlawful intrusion into his body, and he has described a strip search conducted in an open area and in a harassing manner. Accepting these allegations as true for purposes of screening the complaint, I conclude that plaintiff has stated claims under the Fourth and Eighth Amendments against Stephen, Anderson, Gerry, and Miller, but not against Wall.

Inmates do not give up all Fourth Amendment protections when they are in prison, but “given the considerable deference prison officials enjoy to run their institutions it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment.” *Peckham v. Wis. Dep’t of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998). The Seventh Circuit has nevertheless held that “the Fourth Amendment protects, to some degree, prisoners’ bodily integrity against unreasonable intrusions *into* their bodies.” *King v. McCarty*, 781 F.3d 889, 900 (7th Cir. 2015) (original emphasis). Here, plaintiff alleges that Stephen inserted a finger into his buttocks, Dkt. 1, ¶¶ 5-6, which I construe to mean an intrusion into plaintiff’s anus. To succeed on this claim, plaintiff will have to demonstrate that Stephen’s search, as it was actually conducted—and the other defendants’ failure to intervene during the search—was objectively unreasonable. *King*, 781 F.3d at 899. At this point, accepting as true plaintiff’s allegation that Stephen penetrated his anus, plaintiff has alleged an unreasonable search.

Plaintiff may therefore proceed against Stephen, Anderson, Gerry, and Miller with a claim under the Fourth Amendment.

Under the Eighth Amendment, “[s]trip searches are not *per se* unconstitutional.” *Fillmore v. Page*, 358 F.3d 496, 505 (7th Cir. 2004) (original emphasis). Of course, “strip searches may be unpleasant, humiliating, and embarrassing to prisoners, but not every psychological discomfort a prisoner endures amounts to a constitutional violation.” *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003). Strip searches with legitimate, penological justifications are not unconstitutional. *Id.* Instead, the Eighth Amendment prohibits searches “conducted in a harassing manner intended to humiliate and inflict psychological pain.” *Id.*

Plaintiff presents two challenges to the strip search at issue in this case. First, Stephen performed the search in view of other inmates, which caused plaintiff unnecessary humiliation and emotional pain. If true, these allegations would support the conclusion that CCI staff conducted the search to demean and humiliate plaintiff. *Id.* at 940; *Ghashiyah v. Frank*, No. 07-cv-308, 2007 WL 2061053, at *7 (W.D. Wis. July 12, 2007). Plaintiff’s second challenge is that Stephen’s conduct during the search constituted a sexual assault and that there was no legitimate penological justification for Stephen to insert a finger into plaintiff’s anus. This allegation states a Fourth Amendment claim, and it is also sufficient to support an Eighth Amendment claim. Plaintiff may therefore proceed against Stephen, Anderson, Gerry, and Miller with a claim under the Eighth Amendment.

At this point, however, plaintiff cannot proceed against Wall with either of his claims because the complaint does not allege that Wall knew of, or was personally involved in, the specific strip search at issue in this case. *See Peckham*, 141 F.3d at 697 (a case is “dismissable as to all individual defendants because none of them personally participated in any of the

searches”). Instead, plaintiff alleges that Wall “is responsible for the rules, regulations and policies employed by correctional institutions.” Dkt. 1, ¶ 9. But plaintiff cannot sue Wall “merely for [his] supervisory role of others. An individual cannot be held liable in a § 1983 action unless he caused or participated in the alleged constitutional deprivation.” *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000). I will therefore deny plaintiff leave to proceed against Wall, who I will dismiss from this case.

ORDER

IT IS ORDERED that:

1. Plaintiff Richard Lewis is GRANTED leave to proceed against defendants Michael Stephen, Theodore Anderson, Bryan Gerry, and Andrew Miller with his Fourth Amendment claims for an unreasonable search of his person, and with his Eighth Amendment claims for conducting an improper strip search.
2. Plaintiff is DENIED leave to proceed against defendant Edward Wall, who is DISMISSED from this case.
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 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.
4. 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.
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 account until the filing fee has been paid in full.

Entered September 23, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge