

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

PETER M. JOSEPHSON,

Plaintiff,

v.

OPINION & ORDER

C/O DOWNING, JOHN DOE/JANE DOE,
SGT. JEFFERIES, and CAPT. PETERS,

16-cv-413-jdp

Defendants.

Pro se plaintiff Peter Josephson is in the custody of the Wisconsin Department of Corrections (DOC), and he is currently incarcerated at the New Lisbon Correctional Institution (NLCI). Plaintiff has filed a proposed complaint under 42 U.S.C. § 1983, alleging that one of his prison guards sexually assaulted him. Dkt. 1. Plaintiff has also filed a motion for assistance recruiting counsel. Dkt. 5.

Plaintiff made an initial partial payment of his filing fee, as directed by the court. 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 can 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, 520 (1972) (per curiam). After reviewing the complaint with this principle in mind, I will grant plaintiff leave to proceed against defendants C/O Downing and John Doe with claims under the Eighth Amendment for sexually assaulting plaintiff and for failing to protect plaintiff. I will deny plaintiff leave to proceed against defendants Sgt. Jefferies and Capt. Peters. I will also deny plaintiff's motion for assistance recruiting counsel.

ALLEGATIONS OF FACT

Plaintiff is currently incarcerated at NLCI. Defendants are DOC employees who worked at NLCI during the relevant events.

In November 2010 (plaintiff does not say which specific day), defendant Downing woke plaintiff up at 1:00 a.m. to take a urine test. Downing and defendant John Doe, an unidentified correctional officer, walked plaintiff to an empty cell. Downing led plaintiff inside the cell and closed the door behind the two of them, leaving John Doe outside. Inside the cell, Downing directed plaintiff to take off his clothes and urinate. As plaintiff complied, Downing rubbed himself against plaintiff's backside and breathed on plaintiff's neck. After plaintiff finished the urine test, he got dressed and went back to his cell.

Plaintiff reported the incident to defendant Jefferies, who asked plaintiff if he wanted to talk to a "white shirt." Dkt. 1, at 2. Plaintiff replied that he did, and he eventually spoke with defendant Peters. Peters told plaintiff that he would investigate and get back to plaintiff within a week. But plaintiff never heard from Peters.

Sometime later, plaintiff spoke to Jefferies again. He asked for the names of the guards who had conducted his urine test. Jefferies responded by shouting at plaintiff that it was not his business and that it was being "taken care of." *Id.* at 3. Plaintiff felt that Jefferies was intimidating him to keep him from pursuing the issue further.

On March 14, 2016, a different officer at NLCI investigated the incident, pursuant to the Prison Rape Elimination Act. Nobody ever contacted plaintiff as part of the investigation. Although the officer wrote a report after he finished investigating, plaintiff has been unable to obtain a copy of the report because it is confidential. Plaintiff believes that the report confirms that officers at NLCI violated DOC policy when conducting his urine test.

Since the investigation, plaintiff has experienced retaliation from other correctional officers at NLCI. These officers are not defendants in this case, and plaintiff does not describe specifically how they retaliated against him. But plaintiff has filed inmate grievances about the retaliation.

Plaintiff filed a complaint in this court on June 15, 2016.

ANALYSIS

Under Federal Rule of Civil Procedure 8, “a complaint must provide a short and plain statement of the claim showing that the pleader is entitled to relief, which is sufficient to provide the defendant with ‘fair notice’ of the claim and its basis.” *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (citations and internal quotation marks omitted). Plaintiff has adequately alleged Eighth Amendment claims against defendants Downing and John Doe, and so I will grant him leave to proceed with these claims. But plaintiff has not stated claims against any of the other defendants. Thus, I will deny plaintiff leave to proceed against these defendants and dismiss them from this case.

“An unwanted touching of a person’s private parts, intended to humiliate the victim or gratify the assailant’s sexual desires, can violate a prisoner’s constitutional rights whether or not the force exerted by the assailant is significant. . . . Indeed, sexual offenses need not involve *any* touching.” *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012) (original emphasis) (citations omitted). Based on the allegations in the complaint—which I must accept as true at this point—I conclude that plaintiff has stated an Eighth Amendment claim against Downing for sexually assaulting him.

Plaintiff does not explain specifically what John Doe did that was unlawful. Construing the complaint liberally, I take plaintiff to allege that John Doe failed to protect him from Downing's sexual assault. "The Eighth Amendment's prohibition against cruel and unusual punishment requires that prison officials take reasonable measures to guarantee the safety of the inmates." *Santiago v. Walls*, 599 F.3d 749, 758 (7th Cir. 2010) (citations and internal quotation marks omitted). "To state a failure to protect claim, a plaintiff-inmate must allege that (1) he is incarcerated under conditions posing a substantial risk of serious harm, and (2) defendant-officials acted with 'deliberate indifference' to that risk." *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005) (citations and internal quotation marks omitted). For the second of these elements, plaintiff must "allege facts sufficient to show that [John Doe] had actual knowledge of an impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from [John Doe]'s failure to prevent it." *Santiago*, 599 F.3d at 756.

Plaintiff has not alleged that John Doe knew what Downing would do during the urine test. But plaintiff describes the incident as violating DOC procedure. If that is true, then John Doe could have been on alert as soon as Downing went into a cell with an inmate and closed the door, particularly if John Doe knew that plaintiff was going to be giving a urine sample. Under these circumstances, I conclude that plaintiff has alleged a plausible basis from which to infer that John Doe had actual knowledge of an impending harm. Thus, plaintiff has stated an Eighth Amendment claim against John Doe for failing to protect him from Downing's assault. At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Crocker will explain the process for plaintiff to identify John Doe's real name and amend the complaint to include the proper identity for this person.

As for the remaining defendants, plaintiff has not alleged that they did anything wrong. For example, plaintiff alleges that he never heard from defendant Peters after asking him to investigate. Dkt. 1, at 2. But he does not allege that Peters refused to investigate; to the contrary, Peters promised that he would look into the matter. *Id.* Under the circumstances that plaintiff alleges in his complaint, Peters's failure to follow up does not amount to a constitutional violation. Likewise, plaintiff alleges that when he initially reported the incident, defendant Jefferies directed him to speak with Peters. *Id.* Later, Jefferies was dismissive when plaintiff asked for the names of the officers involved, and plaintiff alleges that he felt intimidated. *Id.* at 3. Yet plaintiff does not identify any retaliatory actions that Jefferies actually took. And a lone instance of a correctional officer using a harsh tone toward an inmate does not amount to a constitutional violation.

Because plaintiff has not provided a short and plain statement of any claim against Peters and Jefferies, I will deny him leave to proceed against these defendants. If plaintiff believes that there is a basis to pursue claims against Peters or Jefferies (or both)—for example, if they failed to protect him from a later sexual assault or from an ongoing danger of another sexual assault—then he may amend his complaint to allege facts that would support these claims.

Finally, I will deny plaintiff's motion for assistance recruiting counsel. But I will do so without prejudice to plaintiff renewing his request later in this case. Litigants in civil cases do not have a constitutional right to a lawyer, and I have discretion to determine whether assistance recruiting counsel is appropriate in a particular case. *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007). To prove that assistance recruiting counsel is necessary, this court generally requires that a pro se plaintiff: (1) provide the names and addresses of at least three

lawyers who declined to represent him in this case; and (2) demonstrate that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his demonstrated ability to prosecute it. *Id.* at 655; *see also Young v. Cramer*, No. 13-cv-077, 2013 WL 5504480, at *2 (W.D. Wis. Oct. 3, 2013).

Plaintiff identifies four attorneys or firms whom he has contacted about representation in this case. Dkt. 5. But plaintiff has not submitted letters from these attorneys or firms, which is reason enough to deny his motion. *See Jackson v. County of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) (“[T]he district judge must first determine if the indigent has made reasonable efforts to retain counsel and was unsuccessful or that the indigent was effectively precluded from making such efforts.”). If plaintiff decides to file a motion for assistance recruiting counsel later in this case, then he must provide adequate documentation to demonstrate that he has requested assistance from at least three firms or attorneys, and that these requests have been unsuccessful.

Plaintiff also cannot meet the second requirement for assistance recruiting counsel: demonstrating that the legal and factual difficulty of this case exceeds his ability to prosecute it. It is too early to tell whether plaintiff’s claims will outstrip his litigation abilities. In particular, the case has not passed the early stage in which defendants may file a motion for summary judgment based on exhaustion of administrative remedies, which often ends up in dismissal of cases such as plaintiff’s before they advance deep into the discovery stage of the litigation. Should the case pass the exhaustion stage, and should plaintiff continue to believe that he is unable to litigate the suit himself, then he may renew his motion.

ORDER

IT IS ORDERED that:

1. Plaintiff Peter Josephson is GRANTED leave to proceed against defendants C/O Downing and John Doe on his Eighth Amendment claims of deliberate indifference and failure to protect, as indicated above.
2. Plaintiff is DENIED leave to proceed against defendants Sgt. Jefferies and Capt. Peters, who are DISMISSED from this case.
3. Plaintiff's motion for assistance recruiting counsel, Dkt. 5, is DENIED without prejudice to plaintiff renewing his request later in this case.
4. 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.
5. 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.
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. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered July 8, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge