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

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DAVID E. SIERRA-LOPEZ,

OPINION and ORDER

Plaintiff,

17-cv-646-bbc

v.

OFFICER BLAIR, SGT. CHATTMAN, LT. PARENTO,
DR. PERSIKE, DR. WHITE, RHUI MANAGER WALKER,
SECURITY DIRECTOR WEBER, WARDEN MICHAEL DITTMANN,
OFFICER BAKER, SGT. ROYCE, OFFICER CONROY, LT. ANDERSON,
CPT. MORGAN, OFFICER SMALL, CPT. BOODRY and
SOCIAL WORKER WESTOVER,

Defendants.

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Pro se plaintiff David E. Sierra-Lopez is incarcerated at the Columbia Correctional Institution. He filed this proposed civil action under 42 U.S.C. § 1983, contending that staff at the Columbia Correctional Institution violated his constitutional rights by failing to protect him from harming himself, using excessive force against him and sexually assaulting him. Because plaintiff is incarcerated, his complaint must be screened under 28 U.S.C. § 1915A. After reviewing the complaint, I conclude that plaintiff may proceed with claims against defendants Blair, Persike, Anderson and White. The other defendants will be dismissed because plaintiff's allegations are insufficient to state a claim against them.

Also before the court are plaintiff's motions for assistance in recruiting counsel, dkt. #5, and motions for temporary injunctive relief. Dkt. ##4, 10. For the reasons below, those motions will be denied.

Plaintiff alleges the following facts in his complaint.

ALLEGATIONS OF FACT

A. The Parties

Plaintiff David E. Sierra-Lopez is incarcerated at the Columbia Correctional Institution, where all defendants are employed. Defendants Blair, Baker and Small are correctional officers; Chattman and Royce are correctional sergeants; Parento and Anderson are lieutenants in the restrictive housing unit; Morgan and Boodry are captains; Persike and White are psychologists and supervisors in the psychological services unit; Conroy is an associate in the psychological services unit; Walker is the manager of the restrictive housing unit; Weber is the security director; Michael Dittman is the warden; and Westover is a social worker.

B. Plaintiff Engages in Self-Harm and Receives Property Restrictions

Plaintiff suffers from depression, hears voices, has difficulty sleeping and has attempted suicide in the past. He also has "adjustment problems" and has been placed in solitary confinement for several months.

On December 14, 2016, while he was being held in the restrictive housing unit, plaintiff told defendant Officer Blair that he wanted to hang himself. Blair did nothing. Later, when Blair was conducting rounds, plaintiff told Blair that he had a mental health emergency and needed help. Blair did nothing, and plaintiff cut his arm several times.

Around dinner time, plaintiff showed Blair the cuts he had made on his arm. Blair contacted Chattman, who came to plaintiff's cell and spoke to him. Chattman called defendant Lieutenant Parento. After Parento arrived, plaintiff told him that he intended to hang himself with his bed sheet. Parento, Blair and Chattman then removed plaintiff from his cell and brought him to an interview room.

Defendant Parento contacted defendant Persike in the psychological services unit. Persike concluded that plaintiff did not need to be placed on observation or control status, but should have property restrictions. Plaintiff's property was removed and he was given a smock and mattress and placed back in a segregation cell. A few hours later, Parento provided plaintiff a security blanket.

Defendant Persike was responsible for following up with plaintiff and evaluating his property restriction. The next day, December 15, 2016, plaintiff was stable and did not make any statements suggesting that he was suicidal. However, Persike did not check in with plaintiff or remove the limited property restriction. On December 19, plaintiff wrote to defendant White that Persike had forgotten about him, that no one had checked on him and that he was freezing and having suicidal thoughts. Plaintiff then cut his arm again. Persike came to see plaintiff the next day, December 20, and released him from the property restriction. Persike told defendant Conroy to bring plaintiff clothes, shoes and linens. Plaintiff received his property, but defendant Conroy refused to let plaintiff have linens. Plaintiff later asked defendants Baker, Royce, Conroy and Anderson for linens, but they refused to provide them and tried to "provoke" him instead.

C. Plaintiff is Removed from His Cell

Sometime later on December 20, 2016, plaintiff told defendant Anderson that he needed to go on observation because he was depressed, hearing voices and might harm himself. Anderson did not help plaintiff and instead used a taser on plaintiff's arm to close the trap on his cell door. Plaintiff used paper to cover his window and began to cut his arm. Anderson returned later and asked plaintiff whether he wanted to talk or be seen by a nurse. Plaintiff told Anderson to stay away and Anderson responded that defendant Morgan wanted plaintiff moved for safety purposes. Anderson then returned with a cell extraction team and gassed plaintiff three times. When the team entered, plaintiff was on his knees with his hands behind his back and facing the window. One of the officers kicked plaintiff in his back, causing his face to hit the floor and bleed.

The extraction team transported plaintiff to the showers and removed his clothes. One of the officers pulled down plaintiff's underwear and "spread his buttocks without consent or reason to do so." Plaintiff was placed on control status without any toilet paper or mattress. Plaintiff later made several complaints about the strip search that were reviewed by defendants Boodry, Westover, Persike and Warden Dittmann. None of the defendants thought plaintiff had been sexually abused.

D. Plaintiff Receives a Conduct Report

Defendant Chattman issued a conduct report to plaintiff for the December 14 incident, which was approved by defendant Morgan. On January 5, 2017, plaintiff attended

a due process hearing conducted by defendant Anderson on the conduct report. Anderson "ignored" facts and found plaintiff guilty of "disobeying orders" and "disruptive conduct." Plaintiff was given a punishment of 60 days in disciplinary separation and the loss of 8 days of recreation. Defendant Weber approved the disposition of the conduct report.

On January 8, 2017, plaintiff appealed the disciplinary decision. When plaintiff heard nothing about his appeal, he wrote to the warden's office. On February 12, 2017, the warden's office responded that it had never received plaintiff's appeal.

OPINION

Plaintiff's claims may be organized into four categories: (1) failure to protect plaintiff from harming himself; (2) failure to provide humane living conditions; (3) excessive force; (4) sexual abuse; and (5) violation of due process. I discuss each legal theory below.

A. Eighth Amendment Failure to Protect

The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement" and to insure that "reasonable measures" are taken to guarantee inmate safety and prevent harm. Farmer v. Brennan, 511 U.S. 825, 834-35 (1994). An inmate may prevail on a claim under the Eighth Amendment by showing that the defendant acted with "deliberate indifference" to a "substantial risk of serious harm" to his health or safety. Id. at 836. Significant self-harm constitutes "serious harm." Minix v. Canarecci, 597 F.3d 824, 831 (7th Cir. 2010). Deliberate indifference to a risk of self-harm is present when

an official is subjectively "aware of the significant likelihood that an inmate may imminently" harm himself, yet "fail[s] to take reasonable steps to prevent the inmate from performing the act." Pittman ex rel. Hamilton v. County of Madison, Illinois, 746 F.3d 766, 775-76 (7th Cir. 2014) (citations omitted). See also Rice ex rel. Rice v. Correctional Medical Services, 675 9 F.3d 650, 665 (7th Cir. 2012) ("[P]rison officials have an obligation to intervene when they know a prisoner suffers from self-destructive tendencies.").

Plaintiff's allegations are sufficient to state failure to protect claims against the following:

- Defendant Blair, for failing to respond reasonably when plaintiff told him that he was feeling suicidal on December 14, 2016;

- Defendant Persike, for failing to check on plaintiff after he had harmed himself and was placed on property restrictions;

- Defendant Anderson, for failing to respond reasonably to plaintiff's statements that he needed help on December 20, 2016.

Plaintiff's allegations permit an inference that each of these defendants knew plaintiff was at substantial risk of serious harm but failed to take reasonable measures to help plaintiff. Therefore, plaintiff may proceed with failure to protect claims against these three defendants.

However, plaintiff's allegations are not sufficient to raise failure to protect claims against any other defendants. From plaintiff's own allegations, it appears that the other

defendants either responded promptly when notified of plaintiff's need for help, or had no knowledge that plaintiff was at risk of harming himself.

B. Conditions of Confinement

Plaintiff next contends that defendants violated his rights to humane living conditions by removing his property, placing him in a cold cell without any clothes or adequate blanket and not checking on him for several days. Prison officials violate the constitution if they are "deliberately indifferent to adverse conditions that deny 'the minimal civilized nature of life's necessities.'" Farmer, 511 U.S. at 825. "[C]onditions of confinement, even if not individually serious enough to work constitutional violations, may violate the Constitution in combination when they have 'a mutually enforcing effect that produces the deprivation of a single, identifiable human need.'" Budd v. Motley, 711 F.3d 840, 842-43 (7th Cir. 2013) (citation omitted).

In this instance, plaintiff's allegations suggest that his property was removed for safety reasons. However, at the screening stage, his allegations that he was held in a cold cell during the middle of winter without clothing or adequate blankets and without anyone checking on him are sufficient to state a claim that he was subjected to unconstitutional conditions of confinement. Because plaintiff alleges that defendants White and Persike were aware of his cold cell conditions, and that Persike was responsible for checking on him but failed to do so, plaintiff may proceed against these defendants on his conditions of confinement claim. Plaintiff may not proceed against any other defendants on a conditions

of confinement claim because he did not allege that they were responsible for those conditions or that they had any obligation to check on him. Although he alleges that he was later deprived of linens for an unspecified period of time, plaintiff concedes that he did have clothing and does not allege that he suffered in a cold cell or under any other harsh conditions after his property restrictions were removed.

C. Excessive Force

Plaintiff also seeks leave to proceed on a claim that he was subjected to excessive force when he was forcibly removed from his cell on December 20, 2016. Claims for excessive force in the prison context are governed by the Eighth Amendment, which prohibits the "unnecessary and wanton infliction of pain" on prisoners. Hudson v. McMillian, 503 U.S. 1, 5 (1992); Estelle v. Gamble, 429 U.S. 97, 102–03 (1976). The factors relevant to deciding whether an officer used excessive force include: the need for the application of force; the relationship between the need and the amount of force that was used; the extent of the injury inflicted; the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and any efforts made to temper the severity of a forceful response. Whitley v. Albers, 475 U.S. 312, 320-21 (1986).

Plaintiff alleges that after he told defendant Anderson that he needed help, Anderson responded by tasing plaintiff's hand and then returning with an extraction team, which gassed plaintiff three times. An officer then kicked plaintiff in the back and knocked him

to the floor, although plaintiff was on his knees with his hands behind his back. These allegations are sufficient to state a claim of excessive force. Plaintiff may proceed with his claim against Anderson, as he is the only defendant identified in the complaint as being part of the extraction team. I will assume for purposes of screening that even if Anderson was not the officer who gassed or kicked plaintiff, Anderson could have intervened to prevent the other officers from doing so. At summary judgment or trial, however, plaintiff will have to prove that Anderson was personally responsible for any excessive force used against plaintiff. or that he could have prevented the use of such force. Minix, 597 F.3d at 833-34 ("[I]ndividual liability under § 1983 requires personal involvement in the alleged constitutional deprivation.") (internal quotation omitted).

D. Alleged Sexual Assault

Prison staff can violate the Eighth Amendment by maliciously inflicting pain or injury, Guitron v. Paul, 675 F.3d 1044, 1046 (7th Cir. 2012), or by performing some action 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); Gillis v. Pollard, 554 Fed. Appx. 502, 505 (7th Cir. 2014). Plaintiff contends that an unidentified officer that was part of defendant Anderson's extraction team violated the Eighth Amendment when he spread plaintiff's buttocks during a strip search.

Plaintiff's allegations are insufficient to permit an inference that any defendant involved in the strip search acted with an intent to inflict pain, humiliate plaintiff or gratify

their own sexual desires. For example, plaintiff does not allege that the touching was painful, lasted for an unnecessarily long time, that any officer said anything inappropriate or that any officer otherwise behaved in any way to suggest that the touching was for his own sexual gratification. Plaintiff also does not suggest that the officers' actions were out of the ordinary in the context of a strip search before a transfer to control status.

The lack of such allegations distinguishes plaintiff's allegations from those in which plaintiffs have been permitted to proceed on sexual assault claims under the Eighth Amendment. For example, in Washington, 695 F.3d at 643, the court of appeals held that a prisoner's allegations were sufficient where the prisoner alleged that a guard had spent "five to seven seconds gratuitously fondling the plaintiff's testicles and penis through the plaintiff's clothes and then, while strip searching him, fondling his nude testicles for two or three seconds . . . again without any justification." Similarly, the court of appeals found in Rivera v. Drake, 497 Fed. Appx. 635, 637-38 (7th Cir. 2012), that a prisoner's allegations were sufficient where he alleged that a guard inserted his finger into the prisoner's anus during a standard strip search, causing him humiliation and substantial pain, and without any legitimate justification. Finally, in Sloan v. Bohlmann, 2011 WL 830544, *3 (E.D. Wis. 2011), the plaintiff was permitted to proceed on the basis of allegations that a doctor had moved his finger in and out of the plaintiff's rectum multiple times, during an exam, while asking questions like "how does that feel?" and "does that make you feel like you are going to ejaculate?"

In contrast to these cases, plaintiff's claim seems to be based entirely on his surprise that he was stripped and searched without warning or consent. Although I understand how the officers' behavior could have been surprising and embarrassing to plaintiff, I am not convinced that plaintiff's allegations are sufficient to sustain a constitutional claim against any defendant. Accordingly, plaintiff may not proceed on a claim of alleged sexual assault.

E. Due Process

Plaintiff alleges that he was denied due process at the disciplinary hearing conducted by defendant Anderson on the conduct report he received regarding the December 14, 2016 incident. A prisoner challenging the process afforded in a prison disciplinary proceeding must show that: (1) he has a liberty or property interest with which the state interfered; and (2) the procedures he was afforded upon that interference were constitutionally deficient. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989); Marion v. Columbia Correctional Institution, 559 F.3d 693, 697 (7th Cir. 2009); Scruggs v. Jordan, 485 F.3d 934, 939 (7th Cir. 2007). Plaintiff's due process claim appears to be grounded on an alleged deprivation of a "liberty interest," as he alleges that he was subjected to 60 days' segregation as a result of the conduct report. Case law states that a prisoner's placement in segregation may create a liberty interest "if the length of segregated confinement is substantial and the record reveals that the conditions of confinement are unusually harsh." Marion, 559 F.3d at 697. See also Townsend v. Cooper, 759 F.3d 678, 687 (7th Cir. 2014).

Plaintiff's 60-day confinement in segregation is likely not sufficient to trigger due process protections. Sandin v. Conner, 515 U.S. 472, 486 (1995) (short-term placements in segregation do "not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest," triggering the protections of the due process clause); Townsend v. Fuchs, 522 F.3d 765, 766 (7th Cir. 2008) (two months in segregation does not deprive inmate of liberty interest); Hoskins v. Lenear, 395 F.3d 372, 374 (7th Cir. 2005) (two months); Lekas v. Briley, 405 F.3d 602, 612 (7th Cir. 2005) (three months); Thomas v. Ramos, 130 F.3d 754, 761 (7th Cir. 1998) (approximately 70 days).

However, even if I assume plaintiff has alleged deprivation of a protected liberty interest, his allegations do not permit an inference that he was denied due process. Plaintiff's right to process before receiving a term of segregation would be limited to notice of the reasons for the proposed placement and an adequate opportunity to present his views regarding why he should not be disciplined. Westefer v. Neal, 682 F.3d 679, 683 (7th Cir. 2012). Here, plaintiff alleges that he received a formal disciplinary hearing. Although plaintiff was not satisfied with the outcome, he was afforded an opportunity to be heard on the charges. He was not denied constitutional due process.

F. Motions for Preliminary Injunctive Relief

Plaintiff has filed two motions for preliminary injunctive relief, in which he asks to be moved to a different prison or, in the alternative, for a court order prohibiting defendants from placing him in solitary confinement, subjecting him to harsh conditions or depriving

him of adequate medical care . Dkt. ##4, 10. I will deny plaintiff's requests for preliminary injunctive relief at this time.

First, plaintiff's motions are procedurally defective because they fail to comply with this court's procedure for obtaining preliminary injunctive relief, a copy of which will be provided to plaintiff with this order. Under these procedures, a plaintiff must file and serve proposed findings of fact that support his claims, along with any evidence that supports those proposed findings. Plaintiff has neither submitted proposed findings of fact nor any evidence to support those findings.

Second, even if plaintiff's motions were not facially flawed, I would deny them on the merits at this time. To prevail on a motion for a preliminary injunction, plaintiff must show: (1) a likelihood of success on the merits of his case; (2) a lack of an adequate remedy at law; and (3) an irreparable harm that will result if the injunction is not granted. Lambert v. Buss, 498 F.3d 446, 451 (7th Cir. 2007). Plaintiff has yet to show a likelihood of success on the merits of his claims. In order to do so, plaintiff would need to submit actual evidence in support his claims, including more detailed information about the alleged harm he has suffered and continues to suffer and why he believes defendants are responsible. Although plaintiff's allegations are sufficient to pass the screening stage, his submissions fall far short of showing that he needs the extraordinary relief that he seeks. Accordingly, he is not entitled to injunctive relief.

G. Motion for Assistance in Recruiting Counsel

Finally, plaintiff has requested that the court recruit counsel to assist him with his case. Dkt. #5. He alleges that he is unable to afford counsel, imprisonment will limit his ability to litigate, his case is complex and he has limited access to the library and limited knowledge of law. I will deny this motion without prejudice for several reasons.

Before the court will consider a request for assistance, it must first find that the plaintiff has made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court letters from at least three lawyers who denied plaintiff's request for representation in this case. Alternatively, if the lawyers plaintiff writes do not respond after 30 days, plaintiff may explain the efforts he took to obtain a lawyer in a declaration sworn under penalty of perjury. 28 U.S.C. § 1746. At a minimum, plaintiff should include the date he sent the letters and a copy of the letters themselves.

Attached to plaintiff's motion is one letter from an attorney declining to represent someone named "Fernandez A. Alejandro." Dkt. #5-1. Plaintiff says that Alejandro is his cellmate and that plaintiff used his name because plaintiff had no stamps. However, this is insufficient to show that plaintiff has unsuccessfully asked three lawyers to represent him on *this* case. Plaintiff must submit a declaration explaining what information he sent to the lawyer identified in dkt. #5-1, as well as proof that he asked at least two other lawyers to represent him.

Additionally, in determining whether to recruit counsel for a pro se litigant, the relevant question is whether the complexity of the case exceeds the plaintiff's ability to litigate it. Pruitt v. Mote, 503 F.3d 647, 653 (7th Cir. 2007). It is too early to make that determination in this case. Plaintiff's complaint was legible, coherent and identified relevant facts and legal standards. His claims are not complex when compared with those of many other claims submitted by pro se litigants because, for the most part, plaintiff has first-hand knowledge of the relevant facts. At the preliminary pretrial conference, plaintiff will receive a substantial amount of information about how to proceed with his case. At this stage, I have no reason to believe that plaintiff will be unable to litigate this case on his own. Accordingly, I will deny plaintiff's request for counsel without prejudice. He may renew his motion at any time should this case turn out to be more complex that it currently appears.

ORDER

IT IS ORDERED that

1. Plaintiff David E. Sierra-Lopez is GRANTED leave to proceed on the following claims:

a) Defendant Officer Blair violated plaintiff's rights under the Eighth Amendment by failing to protect him from harming himself on December 14, 2016;

b) Defendant Dr. Persike violated plaintiff's rights under the Eighth Amendment by failing to check on plaintiff after he had harmed himself and was placed on property restrictions and by subjecting him to harsh conditions of confinement;

c) Defendant Lt. Anderson violated plaintiff's rights under the Eighth Amendment by failing to respond reasonably to plaintiff's statements that he needed help and by using excessive force, or failing to protect him from excessive force, on December 20, 2016;

d) Defendant Dr. White violated plaintiff's rights under the Eighth Amendment by subjecting plaintiff to harsh conditions of confinement.

2. Plaintiff is DENIED leave to proceed on any other claim. Defendants Sgt. Chattman, Lt. Parento, RHUI Manager Walker, Security Director Weber, Warden Michael Dittmann, Officer Baker, Sgt. Royce, Officer Conroy, Cpt. Morgan, Officer Small, Cpt. Boodry and Social Worker Westover are DISMISSED from this case.

3. Plaintiff's motions for preliminary injunctive relief, dkt. ##4, 10, are DENIED.

4. Plaintiff's motion for assistance in recruiting counsel, dkt. #5, is DENIED without prejudice.

5. 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 the defendants. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.

6. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendants or to defendants' attorney. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendants.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. 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 this 3d day of January, 2018.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge