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

SCOTT ROBERT WILCOX,

Plaintiff,

v.

MARK KING, BRIAN FOSTER, RORY THELEN, and GARY HAMBLIN,

Defendants.

OPINION AND ORDER

12-cv-704-wmc

In this proposed civil action, plaintiff Scott Robert Wilcox alleges that a State of Wisconsin Correctional Officer, defendant Mark King, violated his constitutional and statutory rights by sexually assaulting him while he was incarcerated at Kettle Moraine Correctional Institution and then retaliating against him when he complained about the assault. Wilcox further alleges that Officer King's superiors, defendants Robert Humphreys, Rory Thelen and Gary Hamblin, failed to protect him against King's assault and retaliation, all in violation of the Eighth Amendment of the United States Constitution.

Wilcox asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Wilcox has provided the court, the court concluded that he is unable to prepay the full fee for filing this lawsuit. Wilcox has made the initial partial payment of $258.40 required of him under § 1915(b)(1). The next step is determining whether Wilcox's proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Because Wilcox meets

this step as to certain defendants and certain claims, he will be allowed to proceed and the state required to respond.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Wilcox alleges, and the court assumes for purposes of this screening order, the following facts:

- Plaintiff Scott Wilcox is currently incarcerated at the Columbia Correctional Institution, but for all times relevant to his complaint, he was incarcerated at Kettle Moraine Correctional Institution.

- For all times relevant to the complaint, Gary Hamblin was the Secretary of the Department of Corrections of the State of Wisconsin, and Robert Humphreys was the warden of Kettle Moraine. Rory Thelen is a captain at Kettle Moraine. Mark King is a correctional officer, assigned to work at Kettle Moraine.

- On April 9, 2011, Wilcox was at his prison job in the main kitchen. Around 1:00 p.m., Wilcox and the other dishwashers had completed washing the lunch dishes and were preparing to return to their units. Wilcox and the others lined up with their time cards. At that time, defendant King conducted a "pat search," during which he allegedly inappropriately touched Wilcox.

- The complaint alleges in pertinent part:

> [King] went down my sides from my chest to my waist just below my belly button, then his right hand went directly onto my penis, . . . his hand was on my penis -- without a doubt he pressed hard and firmly, as if feeling me. . . . At this point his hands moved down my outer thighs to my knees, that point he went up my inner thighs, directly back to my penis at which point he pressed firmly and hard and rubbed in a clockwise rotation 2-3 times once again with his right hand.

(Compl. (dkt. #1) p.3.)

- Wilcox alleges that King also inappropriately touched the other inmates in line with him on April 9, 2011.

- Later that same day, Wilcox and the other inmates reported the sexual touching to their immediate supervisor, civilian cook "Ms. Kay (Marlene Ramirez)." Ms. Kay allegedly told Wilcox and the others that they should file inmate complaints and that she would observe all pat searches by King going forward.

- Also on April 9, 2011, Wilcox filed an offender complaint (#2011-7304), describing King's assault. (Compl. (dkt. #1) p.3; Ex. B (dkt. #1-1) p.1.) The complaint was dismissed by the ICE on April 14, 2011, because complaints about staff sexual misconduct are referred to the warden. (Compl., Ex. J (dkt. #1-1) p.7.) Warden Humphreys dismissed the complaint himself on April 14, 2011. (*Id.*, Ex. L-1 (dkt. #1-1) p.9.)[1]

- On or about April 19, 2011, King was in the kitchen while Wilcox was working. As he was walked past the "bubble" where King and another officer were sitting, King called him over and said "Wilcox -- I ought to slap you!" (Compl. (dkt. #1) p.4.)

- Wilcox reported this second encounter to "Ms. Kay" and to civilian food service manager Donna Schroeder. Wilcox alleges that Schroeder prepared a statement based on Wilcox's description of events.

- On April 22, 2011, defendant Rory Thelen called Wilcox and two other inmates who also worked in the kitchen into the administration building for an investigatory interview. Schroeder was also present and was taking notes. Wilcox again reported the alleged April 9, 2011, assault and King's threat to slap him on April 19, 2011.

- A few days later, Wilcox again encountered King around the main kitchen's back door. He overheard King say to another inmate, "that fucker right there -- ain't that right Wilcox." (Compl. (dkt. #1-1) p.5.)

- Wilcox also reported this incident to Schroeder who advised him to fill out his own statement since she "could not get involved 'again' in writing a statement." (Compl. (dkt. #1-1) pp.5-6.) Wilcox alleges that he wrote another statement but does not know what happened to it.

[1] The court need not recount all of the allegations surrounding Wilcox's complaint since it is not material to the court's determination of whether he has stated a claim for relief, though it will likely be relevant to an exhaustion challenge.

- Wilcox alleges that after each encounter with King he felt "nervous, scared, embarrassed, humiliated, in shock." (Compl. (dkt. #1-1) p.3; *see also id.* at p.5 ("in fear, scared and did not want to stay near" King); *id.* at p.6 ("felt scared, nervous, anxiety attack, fearful, awkward").)

- Wilcox alleges that Thelen and Humphreys were aware of his complaint and failed to take the necessary steps to protect him. Wilcox also alleges that both were aware of prior incidents involving King and other inmates.

- Wilcox was transferred to another correctional institution on May 4, 2011.

OPINION

Wilcox seeks to bring claims against King for "sexual assault, harassment, retaliation, threats, negligence, battery" in violation of his constitutional rights; and against Thelen and Humphreys for failing to protect him from King's actions.

I. Claims Against Hamblin

While Wilcox names Gary Hamblin, the former Secretary of the Department of Corrections, as a defendant in the caption of his complaint, the complaint itself contains no allegations specific to him, and certainly no allegations to support a finding that the alleged constitutional violation occurred with Hamblin's "knowledge and consent." *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) ("To recover damages under § 1983, a plaintiff must establish that a defendant was personally responsible for the deprivation of a constitutional right."). As such, the court will dismiss him as a

defendant from this action.[2] With that aside, the court now will address Wilcox's proposed claims against the other defendants.

II. Claims Against King

The Eighth Amendment's prohibition of cruel and unusual punishment bars prison authorities from "unnecessarily and wantonly inflicting pain on inmates." *Rivera v. Drake*, No. 12–1585, 2012 WL 6040734, at *2 (7th Cir. Dec. 5, 2012) (unpublished) (citing *Hope v. Pelzer*, 536 U.S. 730, 737 (2002); *Whitman v. Nesic*, 368 F.3d 931, 934 (7th Cir. 2004)). "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." *Washington v. Hively*, 695 F.23d 641, 643 (7th Cir. 2012). The Seventh Circuit in *Washington* also recognized that the psychological harm caused by gratuitous fondling of an inmate's testicles and penis during a pat down was sufficient to constitute "pain" under the Eighth Amendment. *Id.* at 642.

Based on this case law, the court concludes that Wilcox's complaint states a claim against defendant Mark King for violation of his Eighth Amendment rights. Wilcox alleges that King touched his penis repeatedly on April 9, 2011, in a sexual way that one may reasonably infer was intended to humiliate Wilcox and/or sexually gratify King. *See*

[2] The complaint also contains no allegations that the Department of Corrections as a whole had adopted a policy or custom of indifference or tacit consent to the misconduct alleged.

Washington, 695 F.3d at 644 ("We don't see how the defendant's conduct if correctly described by the plaintiff could be thought a proper incident of a pat down or search[.]").

Wilcox's complaint also lists battery as a claim for relief. Under Wisconsin law, "[b]attery is defined as a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such contact, or apprehension that such a contact is imminent." *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 320 n.3, 565 N.W.2d 94, 96 n.3 (1997) (finding teenage parishioner's allegations of sexual assault by a priest describe a "sexual battery"). Similarly, the court finds the allegations in Wilcox's complaint sufficient to state a civil claim of battery under Wisconsin law. At this time, the court will also exercise its supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over that claim.

To the extent Wilcox intended to state constitutional or state law claims based on his two subsequent encounters with King -- allegedly involving King stating that he should slap Wilcox on April 19, 2011, and King referring to him as a "fucker" a few days later -- the law does not allow such a claim. It is well-established that mere verbal threats or harassment "are not sufficient to state a constitutional violation cognizable under § 1983." *Pride v. Holden*, No. 92-2620, 1993 WL 299328, at *2 (7th Cir. Aug. 2, 1993) (unpublished) (affirming dismissal of Eighth Amendment claim premised on verbal harassment and threats) (citing *Patton v. Przybylski*, 822 F.2d 697, 700 (7th Cir. 1987)).[3]

For the same reason, Wilcox does not state a claim of retaliation against King since he does not allege a subsequent, actionable adverse consequence arising out of his

[3] The court does not rule at this time if this post-assault conduct may nevertheless be relevant to assessing the psychological damage done Wilcox.

making a complaint about the events of April 9, 2011. To state a retaliation claim, Wilcox must allege that "(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the [d]efendants' decision to take the retaliatory action." *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (internal quotations omitted). Certainly, the filing of an offender complaint constitutes "activity protected by the First Amendment,"[4] but Wilcox does not allege a "deprivation that would likely deter First Amendment activity in the future." To the contrary, he alleges no more than verbal threats, which are not actionable by themselves. *See Pride*, 1993 WL 299328, at *3 ("The failure of mere verbal threats to substantiate a deprivation of the right of access to courts also extends to Pride's claim that fear of retaliation hindered his advocation on behalf of other inmates").

Accordingly, the court will allow Wilcox to proceed against King on an Eighth Amendment claim and a civil battery claim under Wisconsin law based on the alleged April 9, 2011, sexual touching, but will deny Wilcox leave to proceed against King under his other theory of relief.

III. Claim Against Humphreys and Thelen

The court will generously construe Wilcox's claim against defendants Humphreys and Thelen as one for "failure to protect" in violation of the Eighth Amendment of the

[4] "A prisoner has a First Amendment right to make grievances about conditions of confinement." *Watkins v. Kasper*, 599 F.3d 791, 798 (7th Cir. 2010).

United States Constitution. To state such a claim, plaintiff must plead sufficient facts to allow an inference to be drawn that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994); *see also Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005). Deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997) (quotation omitted).

Wilcox's April 9, 2011, offender complaint would have put defendants Humphreys and Thelen on notice of the alleged risk posed by King, but knowledge based on Wilcox's complaint, of course, necessarily occurred *after* the alleged April 9, 2011, assault. For the reasons described above, the complaint does not allege that Wilcox suffered injury for conduct *after* April 9, 2011, which would be essential to form the basis of a failure to protect claim. Still, Wilcox alleges that both Humphreys and Thelen were aware of other inmate complaints about King's bad acts before the April 9, 2011, incident. At this stage at least, this allegation is sufficient to allow Wilcox's failure to protect claim against Humphreys and Thelen to proceed past the screening stage. *See Santiago v. Walls*, 599 F.3d 749, 759 (7th Cir. 2010) (reversing dismissal of failure to protect claim, finding that allegation that warden "knew or should have known" was

"sufficient, at the pleading stage, to state a claim that Warden Walls actually knew or consciously turned a blind eye toward an obvious risk").[5]

Finally, while Wilcox's allegations against the defendants satisfy the court's lower standards for screening, he will ultimately need to come forward with *admissible* evidence permitting a reasonable trier of fact to conclude that the defendants acted with deliberate indifference to his risk of substantial harm. This is a much higher standard than applied to an initial screening. Additionally, Wilcox should be aware that inadvertent error, negligence and gross negligence are insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). Going forward, it will be Wilcox's burden to prove that King posed a substantial risk of harm. Additionally, he must also prove that each defendant (1) *knew* of this risk of harm, and (2) deliberately ignored it.

ORDER

IT IS ORDERED that:

1) Plaintiff Scott Robert Wilcox's request to proceed against defendant Mark King on (1) an Eighth Amendment cruel and unusual punishment claim and (2) civil battery under Wisconsin law, both based on King's alleged April 9, 2011, acts is GRANTED.

2) Plaintiff's request to proceed on his Eighth Amendment failure to protect claim against defendants Brian Foster and Rory Thelen is GRANTED.

[5] While the complaint lists Robert Humphreys as a defendant in this case, Brian Foster has succeeded Humphreys as the Warden of Kettle Moraine Correctional Institution. As such, Foster is automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d), and the caption has been amended accordingly.

3) Plaintiff's request to proceed on an Eighth Amendment failure to protect claim against defendant Gary Hamblin is DENIED.

4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows 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 plaintiff does not have access to 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). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

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 the defendants. 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.

Entered this 8th day of November, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge