

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

JEROME ANTHONY THEUS,

Plaintiff,

v.

MS. WIGAND, MR. KEMPER and
MR. HOWARD,

Defendants.

OPINION AND ORDER

13-cv-681-bbc

Plaintiff Jerome Theus is a prisoner at Racine Correctional Institution who seeks to proceed under 42 U.S.C. § 1983 on claims that prison officials have violated his rights under the Eighth Amendment and his right to review his medical information. In an order dated November 20, 2013, dkt. #5, I screened plaintiff's proposed complaint, dkt. #1, and allowed him to proceed on a claim of deliberate indifference to a serious medical need against defendant Kemper, the warden at the Racine prison. Other allegations in plaintiff's complaint failed to state a claim upon which relief may be granted under Fed. R. Civ. P. 8, so I gave plaintiff an opportunity to amend his complaint. Dkt. #5. In response to this order, he has filed a document that I construe as a supplement to his complaint, dkt. #10, in which he provides further information on his remaining claims. (If in the future plaintiff wishes to amend his complaint or add more parties, he must file a new document that *replaces* his previous complaint by stating all the facts he wishes to allege for each of his claims and

by listing all defendants in the caption.) He also seeks to add the Wisconsin Department of Corrections as another defendant.

After screening plaintiff's supplemental complaint under 28 U.S.C. § 1915, I conclude that in addition to his deliberate indifference claim against defendant Kemper, plaintiff may also proceed on an Eighth Amendment claim arising from unsanitary conditions of confinement against defendants Howard, Wigand and Kemper. The remainder of his supplemental complaint fails to state a claim upon which relief may be granted. In addition, he has named the Wisconsin Department of Corrections, which is not a party subject to suit under 42 U.S.C. § 1983. Therefore, I will dismiss his remaining claims and deny his request to add the Department of Corrections as a defendant.

Plaintiff makes the following allegations of fact in the supplement to his complaint.

ALLEGATIONS OF FACT

Plaintiff is a prisoner at the Racine Correctional Institution. Defendants Kemper and Wigand have directed staff there to not change or clean plaintiff's linens, which have been soaked in his blood and vomit as a result of his medical condition. Defendant Howard has also refused to change plaintiff's linens. At the time plaintiff filed his amended complaint, his linens had not been changed since July 19, 2013. Staff members have told plaintiff that he will have to pay for his linens if he continues to "drool blood and acid" on them. Supp. Cpt., dkt. #10, at 1.

Plaintiff suffers from a hernia, an ulcer, a torn esophagus and acid reflux disease. He

has a doctor from outside the prison system, Dr. Kiel, who has called and written to staff at the Racine prison to ask to see plaintiff, but the prison staff has refused this request. Dr. Kiel has also told prison staff that plaintiff should receive a different prescription medication for his acid reflux disease and that plaintiff should see a specialist because Dr. Kiel believes plaintiff is a candidate for surgery for his acid reflux disease. Dr. Kiel also wrote to say that plaintiff should not be assigned a top bunk bed because he has a knee condition, but prison staff members continue to assign plaintiff to a top bunk bed. Furthermore, plaintiff has asked for his medical file but prison staff members refuse to give it to him.

Plaintiff feels bullied because correctional officers stare at him when he is talking on the phone, search his room and accuse him of “stuff [he] didn’t do,” id. at 2. He believes “something is wrong with the food” because it “tastes weird” and because after eating it the prisoners “all fall asleep.” Id. at 3.

Plaintiff has attached to the supplement to his complaint copies of what appear to be his medical records, correspondence from a doctor’s office and complaints he filed within the prison system.

OPINION

A. Soiled Linens

Plaintiff alleges that he has linens stained with blood and vomit in his cell that have not been changed since July 2013. He says that defendant Howard has refused to change these linens and that defendants Kemper and Wigand have directed prison staff not to

change or launder his linens. To show that the dirty linens create conditions of confinement that violate the Constitution and the Eighth Amendment in particular, plaintiff must show that the conditions are less than “the minimal civilized measure of life’s necessities,” Farmer v. Brennan, 511 U.S. 825, 833–34 (1994), and that defendants acted with deliberate indifference to these conditions, Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997).

It is not clear how often linens must be laundered to comply with the Eighth Amendment, but a charge that linens stained with blood and vomit that are left unchanged for months raises constitutional questions. Cf. Gilland v. Owens, 718 F. Supp. 665, 685 (W.D. Tenn. 1989) (“Short term deprivations of toilet paper, towels, sheets, blankets, mattresses, toothpaste, toothbrushes and the like do not rise to the level of a constitutional violation. On the other hand, frequent or long term deprivations of such items would deprive inmates of constitutional rights.”); Jones v. Wittenberg, 330 F. Supp. 707, 717-18 (N.D. Ohio 1971) aff’d sub nom., Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (ordering “a regular and frequent program [be] established for issuing fresh linens” in county jail to comply with constitutional guarantees). Moreover, plaintiff alleges that defendants Howard, Wigand and Kemper have intentionally prevented him from receiving clean linens, which suggests that they were deliberately indifferent to his conditions. Dixon, 114 F.3d at 644. I find that plaintiff has stated a claim under the Eighth Amendment for his soiled linens and may proceed on this claim against defendants Howard, Wigand and Kemper.

B. Dr. Kiel

Plaintiff alleges that his personal general practitioner, Dr. Kiel, has asked to see him but that prison officials have refused to allow him to do so. He also alleges that Dr. Kiel has provided the prison instructions on plaintiff's care but that prison staff members have refused to follow them. These allegations do not state a claim. The Eighth Amendment does not entitle plaintiff to visit the doctor of his choosing. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997) (“[T]he Constitution is not a medical code that mandates specific medical treatment.”) (quoting Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996)).

C. Medical Records

Plaintiff says that unnamed prison officials prevented him from viewing his medical file. This claim was dismissed in the order entered on November 20, 2013, dkt. #5, because plaintiff does not have a private right of action under the Constitution for denial of access to his medical information.

D. Other Claims

Plaintiff says that he should be granted relief because correctional officers bully him by staring at him while he is on the telephone, searching his room and accusing him of doing things he did not do. Such acts may be unpleasant for plaintiff, but they do not amount to “cruel and unusual punishment” under the Eighth Amendment, so this claim must be dismissed. E.g., DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) (verbal harassment

alone is insufficient to state an Eighth Amendment claim); Peckham v. Wisconsin Department of Corrections, 141 F.3d 694, 697 (7th Cir. 1998) (right of prisoners to be free from searches is limited and prisons do not violate this right so long as searches are pursuant to legitimate security concerns, rather than for purpose of punishment).

Plaintiff's allegations that something is wrong with the food at the prison are "implausible and ungrounded," Atkins v. City of Chicago, 631 F.3d 823, 830-32 (7th Cir. 2011). Plaintiff does not explain why he believes the food is harmful, beyond saying that it tastes "weird" and makes people fall asleep. These allegations are too vague and speculative to state a claim. Cf. Famous v. Pollard, 449 F. App'x 515, 518 (7th Cir. 2011) (plaintiff's mere allegations that contaminated food and toothpaste caused various physical ailments provided "no basis from which to conclude that the meals were contaminated"). In any event, plaintiff does not allege that defendants intentionally contaminated the food or that he has complained about the food to defendants without avail, as would be necessary to show that defendants were deliberately indifferent under the Eighth Amendment. Dixon, 114 F.3d at 644. He also does not indicate which, if any, of the defendants would be responsible for this claim.

E. Wisconsin Department of Corrections

Plaintiff says that he meant to name the Wisconsin Department of Corrections as a defendant in this matter. However, state agencies such as the Department of Corrections are not suable "persons" under 42 U.S.C. § 1983, Will v. Michigan Department of State

Police, 491 U.S. 58, 65-66, (1989), so I will deny his motion to add this defendant.

ORDER

IT IS ORDERED that

1. Plaintiff Jerome Theus is GRANTED leave to proceed on his claims arising under the Eighth Amendment that (1) defendant Kemper was deliberately indifferent to plaintiff's serious medical need and (2) defendants Howard, Wigand and Kemper were deliberately indifferent to the unsanitary conditions of plaintiff's confinement.

2. Plaintiff is DENIED leave to proceed on all other claims.

3. Plaintiff is DENIED leave to add the Wisconsin Department of Corrections as a defendant.

Entered this 3d day of February, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge