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

CARLOS D. LINDSEY,

Plaintiff,

v.

LIEUTENANT DANE ESSER,
CORRECTIONAL OFFICER RUNICE,
CAPTAIN J. SHARP, and
DEPUTY WARDEN HERMAN,

Defendants.

OPINION & ORDER

14-cv-166-jdp

Pro se prisoner Carlos Lindsey has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that defendant Correctional Officer Runice, under the supervision of defendant Lieutenant Dane Esser, sexually assaulted him during a strip search at the Wisconsin Secure Program Facility, in violation of the Eighth Amendment. Dkt. 1. Plaintiff also alleges that defendant Captain Sharp refused to contact the inmate complaint examiner to report the incident and that defendant Deputy Warden Herman failed to protect plaintiff or take measures to prevent the assault from happening.

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 the court 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 and 1915A. In screening 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). After reviewing the complaint with this principle in mind, I conclude that plaintiff has stated an Eighth Amendment claim against defendants Esser and Runice, but that plaintiff has not offered a short and plaint statement of a claim against defendant Herman and has failed to

state a claim against defendant Sharp. I will therefore allow plaintiff to proceed with parts of his complaint and, if he chooses, amend his complaint with regard to Herman. Because plaintiff cannot state a claim against Sharp upon which relief can be granted, however, I will deny plaintiff leave to proceed on that portion of his complaint.

ALLEGATIONS OF FACT

In his complaint, plaintiff alleges the following facts.

Plaintiff is a prisoner at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin. The defendants are all Wisconsin Department of Corrections employees who work at WSPF: Lieutenant Esser; Correctional Officer Runice; Captain Sharp; and Deputy Warden Herman.

On December 14, 2013, plaintiff informed Esser that he needed to go into clinical observation because he was having thoughts of putting something around his own neck and because he did not feel safe in Esser's presence. Esser directed plaintiff to turn around and prepare to be handcuffed so that plaintiff could be escorted to clinical observation. After initially refusing, plaintiff eventually complied and a cell extraction team placed him in handcuffs and leg restraints. The team escorted plaintiff to the Health Services Unit where he received medical attention for abrasions on his arms. The team then escorted plaintiff to a strip search cell.

Once at the cell, Esser informed plaintiff that the team would be conducting a strip search before taking him to clinical observation. Plaintiff, still in handcuffs and leg restraints, was placed on his knees outside the cell and Runice cut off his clothes. Runice then performed the strip search during which plaintiff claims he was sexually assaulted. Specifically, plaintiff alleges that Runice pinched his buttocks, fondled his penis, and swiped his fingers through plaintiff's crotch. Esser supervised the search and did not intervene. None of the other

defendants were present. After the search, Runice placed a towel around plaintiff's midsection and the extraction team took plaintiff to clinical observation without further incident.

Plaintiff remained in clinical observation for about a week. During his stay, he asked Sharp to contact the inmate complaint examiner to report a staff sexual misconduct. Sharp refused and told plaintiff to file a complaint after leaving clinical observation. Near the end of plaintiff's time in clinical observation, plaintiff had a conversation with Herman. Plaintiff informed Herman of the assault, but Herman responded that he had seen the video of the incident and did not know if a complaint would be filed. Plaintiff claims Herman knew that Esser had an "establish[ed] history of assaulting inmates with the use of other staff members," and had records documenting that plaintiff would be assaulted by Runice, with Esser's permission. Plaintiff does not elaborate, however, on what records Herman had or on what basis Herman had knowledge of prior sexual assaults.

OPINION

Under Fed. R. Civ. P. 8, a plaintiff must present "a short and plain statement of the claim showing that [he] is entitled to relief." The purpose of the requirement is "to provide the defendant with 'fair notice' of the claim and its basis." *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011). Here, I understand plaintiff to be bringing claims against all defendants under the Eighth Amendment for violating his right to be free from cruel and unusual punishment. Plaintiff alleges specific conduct that occurred during and after the strip search, and describes each defendant's role in the overall incident. I conclude that plaintiff's allegations are sufficient to state Eighth Amendment claims against Esser and Runice, but not against Herman or Sharp.

I will first address plaintiff's sexual assault claims against Esser and Runice. 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 do not give rise to constitutional violations. *Id.* Instead, the Eighth Amendment prohibits searches "conducted in a harassing manner intended to humiliate and inflict psychological pain." *Id.*

Plaintiff does not suggest that the timing or location of the search was improper or for an impermissible purpose. "After all, moving a prisoner from one unit to another raises security issues that may be managed by strip searches." *Brown v. Boodry*, No. 14-cv-171, 2014 WL 1350911, at *2 (W.D. Wis. Apr. 4, 2014). Rather, plaintiff bases his claim on the *manner* in which Runice conducted the search. Plaintiff alleges that Runice inappropriately pinched and fondled him during the search. Plaintiff describes the adverse psychological effect the incident has had on him, and also claims that as a result of the search, he is subject to harassment from other inmates—who were presumably able to see the search as it was outside the cell. These statements, accepted as true for screening purposes, take plaintiff's complaint beyond a grievance for a routine strip search and plausibly allege a search intended to humiliate and cause psychological pain.

Apart from any wrongful conduct that occurred during the search, plaintiff also alleges that Esser deprived him of the opportunity to consent to a visual search, in violation of the Eighth Amendment. The complaint states that plaintiff asked Esser to perform a visual search, during which plaintiff, rather than prison staff, would have been responsible for lifting his genitals or spreading his buttocks. Plaintiff alleges that Esser ignored his request. Dkt. 1, at 6. This court has analyzed similar claims in the past and held that correctional officers may not "deprive a prisoner of [the] option [of having a visual search] as a matter of course." *Vasquez v.*

Raemisch, 480 F. Supp. 2d 1120, 1132 (W.D. Wis. 2007); *see also Brown v. Boodry*, No. 14-cv-171, slip op. at 3 (W.D. Wis. May 16, 2014). Taken together, plaintiff's allegations directly implicate Esser and Runice in Eighth Amendment violations; Esser for denying plaintiff an opportunity to have a visual strip search and Runice for improperly conducting the search. Accepted as true, the complaint therefore states plausible claims under the Eighth Amendment and I will allow plaintiff to proceed against these defendants.

At this point, however, plaintiff cannot proceed against Herman because his complaint does not provide a short and plain statement of any Eighth Amendment claim for failure to protect. Although plaintiff generally avers that Herman had "well documented" records that Esser would assault him with Runice's assistance, plaintiff fails to suggest what those records might contain, how Herman received them, or how they triggered a duty to protect plaintiff. "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiff does not have to identify the contents or circumstances of the records with exacting particularity, but he must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Because plaintiff's complaint, as it stands, falls short of this standard, I will dismiss the complaint as to Herman and give plaintiff an opportunity to file an amended complaint that satisfies Rule 8.

Plaintiff also cannot proceed against Sharp because his complaint does not connect Sharp to the strip search. Plaintiff does not allege that Sharp was present during the search, *see Peckham v. Wis. Dep't of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998) (a case is "dismissable as to all individual defendants because none of them personally participated in any of the searches"), or that Sharp prevented him from reporting the incident. Instead, plaintiff claims that Sharp

refused to contact the inmate complaint examiner himself. Dkt. 1, at 8. Sharp's refusal does not violate the Eighth Amendment, *see White v. Hinsley*, No. 05-cv-594, 2007 WL 611195, at *4 (S.D. Ill. Feb. 26, 2007) ("The [c]ourt knows of no federal reporting requirement regarding documentation of sexual assault of prisoners. If such a requirement exists it is a creature of state law. The federal government is not the enforcer of state law.") (internal citations omitted), and plaintiff offers no other basis on which he could proceed against Sharp. Absent some connection to the search, or allegations that Sharp breached a duty to protect plaintiff, the complaint fails to state a claim against Sharp under the Eighth Amendment. Because the complaint confirms that Sharp had no role in the search, no amendment could pull him back within plaintiff's proposed Eighth Amendment claim. I will therefore deny plaintiff leave to proceed against Sharp and dismiss him from this case.

ORDER

IT IS ORDERED that:

1) Plaintiff Carlos Lindsey is GRANTED leave to proceed on his Eighth Amendment claims against defendants Lieutenant Dane Esser and Correctional Officer Runice for their involvement in plaintiff's strip search;

2) Plaintiff is DENIED leave to proceed against defendant Captain Sharp, who is DISMISSED from this case;

3) The complaint is DISMISSED with regard to defendant Deputy Warden Herman. Plaintiff may have until August 4, 2014, to file an amended complaint that: (1) repeats the allegations and claims on which the court has allowed plaintiff to proceed; and (2) provides a short and plain statement of a claim against defendant Herman. Specifically, plaintiff must allege a good faith basis for believing that Herman had documentation of Esser's prior assaults and describe the records he believes Herman has and how Herman obtained them;

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) 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; and

7) 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 this 22nd day of July, 2014.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge