

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

JOEL SCOTT FLAKES,

Plaintiff

OPINION AND ORDER

v.

15-cv-245-slc

EDWARD F. WALL, *et al.*,

Defendants.

Pro se plaintiff Joel Scott Flakes has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that prison staff at Stanley Correctional Institution have created dangerous prison environment by publicizing his and other inmate's sexual orientation. Additionally, Flakes alleges that prison staff have improperly rejected all of his attempted to address the situation through the grievance process. The parties consented to magistrate judge jurisdiction, and on February 8, 2016, this case was reassigned to me. (Dkt. 9.) His complaint is before the court for screening under 28 U.S.C. § 1915A.

After reviewing the complaint, the court concludes that Flakes may proceed with his claims that defendants Ms. Stout, Sergeant Szymanski, and Officer Glen violated his right to be free of cruel and unusual punishment under the Eighth Amendment and his right to equal protection under the Fourteenth Amendment. Flakes' remaining claims against the other named defendants will be dismissed, however, for failure to state a claim upon which relief may be granted.

ALLEGATIONS OF FACT¹

Flakes is an inmate at Stanley Correctional Institution. He has a degenerative joint disease and uses a wheelchair. In August 2014, defendant Ms. Stout, a unit supervisor at SCI, began conducting investigations of inmates' sexual orientation as part of the prison's obligations under the Prison Rape Elimination Act. According to Flakes, Stout shared information about inmates' sexual orientation with her subordinates, defendants Sergeant Szymanski and Officer Glen, who have, in turn, shared the information with other inmates. Although Stouts did not interview Flakes, Flakes believes that Stout told Szymanski and Glen that Flakes is homosexual and placed him on a list to be "monitored."

Flakes alleges that these defendants' actions have created a dangerous environment for him and for other homosexual inmates. Flakes has been beaten and abused by cellmates who did not want to be housed with him in the past, and he is worried that this will happen again. Flakes told Glen he was concerned about his safety with his current cellmate, but Glen responded that he did not care if Flakes' cellmate "beat the shit out of [him]." Stout has also refused to assign Flakes a different cellmate.

Flakes is aware that Szymanski and Glen have revealed his sexual orientation to at least one other inmate who was supposed to be Flakes' cellmate. The inmate objected to being placed in Flakes' cell after Glen and Szymanski told the inmate that Flakes was homosexual and instructed the inmate how to protect himself if Flakes attempted to have sex with him. The officers eventually found other accommodations for the inmate, and Flakes was humiliated.

¹ For purposes of this screening order, the court must assume the truth of the well-pled allegations in Flakes's complaint. Because Flakes is a pro se litigant, he is held to a "less stringent standard" in crafting pleadings. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

Flakes has filed numerous grievances regarding his concerns but defendants Edward Wall, Warden Reed Richardson, Deputy Warden Mario Canziana and several complaint examiners -- Leahan Dione, Darcy Zeiler, Ms. Karen Gourlie -- have dismissed his grievances.

OPINION

Flakes alleges that he is bringing claims for violations of his rights under several provisions of the United States Constitution, the Wisconsin Constitution, the Americans with Disabilities Act, and several state statutes. I address each of his theories below:

A. Claims under the Eighth Amendment.

Flakes contends that defendants' actions violated the Eighth Amendment because they created a dangerous situation for him and other inmates who are homosexuals. The Eighth Amendment requires that prison officials "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–527 (1984)). To state an Eighth Amendment failure to protect claim, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. *Farmer*, 511 U.S. at 834.

Flakes has not alleged that any defendants' actions have caused him to suffer serious physical harm. However, Flakes is not required to prove that he has suffered physical harm to state a claim under the Eighth Amendment. "Prison officials who recklessly expose a prisoner to a substantial risk of a serious physical injury violate his Eighth Amendment rights." *Smith v. Peters*, 631 F.3d 418, 421 (7th Cir. 2011). Here, Flakes has alleged that Stout, Glen and

Szymanski have placed him at substantial risk of serious harm by telling other inmates that he is homosexual and by disregarding his concern that his current cellmate will harm him. He also alleges that he has been beaten by cellmates in the past because he is homosexual. Although these allegations are sparse, at the screening stage, Flakes' allegations are sufficient to state a claim under the Eighth Amendment.

But Flakes should be aware that at summary judgment he will have to prove that these defendants have *deliberately* exposed him to a dangerous risk by revealing his sexual orientation to other inmates and by failing to respond to legitimate concerns about his cellmate. This means that he will have to prove that the defendants were both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and they actually drew the inference. *Farmer*, 511 U.S. at 837. It will not be enough for Flakes to show that he simply does not get along with his current cellmate or that *he* believes defendants' actions have placed him at a risk of harm. Rather, Flakes will have to show that it is *highly likely* that he will be seriously harmed and that *defendants* know this, but have disregarded the risk. *See Pinkston v. Madry*, 440 F.3d 879, 889 (7th Cir. 2006) (“[T]here must be a strong likelihood rather than a mere possibility that violence will occur.”) (internal quotations omitted), *and Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010) (plaintiff must show “a conscious, culpable refusal to prevent the harm”).

B. Claims under the Equal Protection Clause.

Flakes also alleges that defendants have violated his right to equal protection. In the prison context, the equal protection clause generally “requires inmates to be treated equally,

unless unequal treatment bears a rational relation to a legitimate penal interest.” *May v. Sheahan*, 226 F.3d 876, 882 (7th Cir. 2000).² The court understands Flakes to be claiming that defendants Stout, Glen and Szymanski violated his right to equal protection by (1) revealing his sexual orientation to other inmates despite knowing that this exposed him to a risk of harm; (2) refusing to respond to his concerns about his cellmate; (3) offering segregation as the only alternative housing option; and (4) permitting other inmates to refuse to be housed with him.

At this stage, Flakes has articulated a viable equal protection claim against Stout, Glen and Szymanski. Although prisons have a legitimate penal interests in protecting inmates who may be faced with a particular risk of harm because of the inmate’s sexual orientation, this court cannot conclude, without more information, that defendants’ alleged actions here were rationally related to that legitimate penal interest. Instead, Flakes’ allegations are meant to suggest that these defendants may have been motivated to discriminate against Flakes because of his sexual orientation, not because they were trying to protect him.

At summary judgment or trial, Flakes will have to prove that any discriminatory treatment was intentional, meaning that Stout, Glen and Szymanski acted with a discriminatory purpose. *Xiong v. Wagner*, 700 F.3d 282, 295 (7th Cir. 2012) (“To establish a violation of the Fourteenth Amendment’s Equal Protection Clause, a plaintiff must demonstrate that a state

² There is a open question in this circuit whether “heightened scrutiny” applies to a claim of discrimination based on sexual orientation. The Seventh Circuit has not yet addressed the subject, though this court has concluded in another context that heightened scrutiny applies. *See Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wis.) (Crabb., J.) (“I conclude that sexual orientation discrimination is subject to heightened scrutiny.”), *judgment entered* (June 13, 2014), *aff’d sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) *cert. denied*, 135 S. Ct. 316, 190 L. Ed. 2d 142 (2014) and *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316, 190 L. Ed. 2d 142 (2014). *See also Mitchell v. Price*, No. 11-CV-260-WMC, 2014 WL 6982280, at *8 (W.D. Wis. Dec. 10, 2014) (Conley, J.) (explaining that applicable standard for equal protection based on transgender status is unsettled). Regardless whether the applicable standard of review is rational basis or heightened scrutiny, however, the court finds that the complaint articulates a viable equal protection claim against defendants Stout, Glen and Szymanski.

actor has treated him differently from [similarly situated persons] and that the actor did so *purposefully*.”) (emphasis added). Flakes also will have to prove that any differential treatment was not related to a legitimate penal interest. *May*, 226 F.3d at 882.

C. Claims Relating to Flakes’ Grievances.

Flakes’s complaint contains several pages of allegations relating to the numerous inmate complaints he filed regarding his concerns about safety of inmates who are homosexuals or pedophiles. He claims defendants Richardson, Canziana, Dione, Zeiler, Gourlie and Wall violated his constitutional rights to free speech and redress of the government, as well as his right to due process, when his complaints were dismissed or ignored.

Flakes’s allegations relating to his inmate complaints do not state a claim upon which relief may be granted. Prison officials may not retaliate against a prisoner for filing a grievance, *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000), but they are under no constitutional obligation to provide an effective grievance system or, for that matter, any grievance system at all. *Owens v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011) (“Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens’s grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim.”). Flakes has not alleged any facts suggesting that defendants retaliated against him for filing grievances. He also has not alleged that any of the defendants involved in reviewing his inmate complaints were personally involved in the underlying conduct by Stout, Glen or Szymanski at issued in his inmate complaints. *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (defendants liable under

§ 1983 only if they were “personally involved” in depriving plaintiff of constitutional rights). Rather, Flakes’ allegations relate solely to defendants’ alleged improper handling of his grievances. Because these allegations do not support any claim for relief, Flakes will not be permitted to proceed on any claims against defendants Richardson, Canziana, Dione, Zeiler, Gourlie and Wall.

D. Claims under the Americans with Disabilities Act.

Flakes states that he intends to sue defendants under the Americans with Disabilities Act (“ADA”). The ADA prohibits discrimination against qualified persons with disabilities. 42 U.S.C. §§ 12131-12134. To establish a violation of Title II of the ADA, a plaintiff “must prove that he is a ‘qualified individual with a disability,’ that he was denied ‘the benefits of the services, programs, or activities of a public entity’ or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was ‘by reason of’ his disability.” *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (citing *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (citing 42 U.S.C. § 12132)). State prisons are considered public entities under the ADA. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998) (citing 42 U.S.C. § 12131(1)(B)).

Based on Flakes’ allegation that he requires a wheelchair, he is arguably a qualified person with a disability under the ADA. 42 U.S.C. § 12102. However, Flakes has not alleged any facts suggesting that he was denied access to any prison programs, activities or other benefits because of his disability. Nor has he alleged that any of the named defendants discriminated against him

in any way because of his disability. Accordingly, Flakes has failed to state a claim under the ADA.

E. Claims under the Wisconsin Constitution.

The court cannot grant relief to Flakes on his claims under the Wisconsin Constitution. The state constitution does not authorize suits for money damages except in the context of a takings claim. *W.H. Pugh Coal Co. v. State*, 157 Wis. 2d 620, 634-35, 460 N.W.2d 787, 792-93 (1990) (holding that plaintiff could sue state for money damages arising from unconstitutional taking of property because article I, section 13 of the Wisconsin Constitution requires that state provide “just compensation” when property is taken); *Jackson v. Gerl*, 2008 WL 753919, *6 (W.D. Wis. 2008) (“Other than one very limited exception inapplicable to this case, I am not aware of any state law provision that allows an individual to sue state officials for money damages arising from a violation of the Wisconsin Constitution.”). With respect to injunctive relief, sovereign immunity principles prohibit federal courts from enjoining state officials under state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). This limitation applies not just to injunctions, but to declaratory relief as well. *Benning v. Board of Regents of Regency Universities*, 928 F.2d 775, 778 (7th Cir. 1991). Because Flakes cannot obtain a remedy in this court under the Wisconsin Constitution, those claims will be dismissed.

F. Claims under State Statute.

Finally, Flakes argues that defendants have violated several state statutory provisions. However, none of the statutory provisions he cites appear to create any private right of action

that may be pursued in federal court. For example, he cites Wis. Stat. ch. 227, which sets forth the rules governing state court judicial review of an agency decision. That statute does not authorize judicial review in federal court. He also cites several state criminal statutes, but those laws may not be enforced by private citizens. Accordingly, Flakes' claims brought under the state statutes identified in his complaint will be dismissed.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Joel Scott Flakes is GRANTED leave to proceed on his claims that defendants Ms. Stout, Sergeant Szymanski, and Officer Glen violated his right to equal protection under the Fourteenth Amendment and his right to be free of cruel and unusual punishment under the Eighth Amendment.
- (2) Plaintiff is DENIED leave to proceed on any other claims. Defendants Edward Wall, Reed Richardson, Mario Canziana, Leahan Drone, Darcy Zeiler, Stanley Correctional Institution, Ms. Karen Gourlie, Corrections Complaint Examiner's Office and Department of Corrections are DISMISSED from this case.
- (3) 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 in this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.
- (4) 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. 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.
- (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) 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 9th day of March, 2016.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge