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

BRYAN RICHARD HOWARD,

Plaintiff,

v.

OPINION & ORDER

RODGERS, CLAUD MAY, A.W. LOFTNESS, SIA WETTLOFFER, SIS LIENHEART, LT CROOKS, LT DAVIS, R.N. TROLL, C.P.R.L. SCHUPE, PSYCH MURELLEY, and C.P.R.L. DRINKARD,

16-cv-158-jdp

Defendants.

Pro se plaintiff Bryan Richard Howard is a prisoner in the custody of the Federal Bureau of Prisons, currently housed at the Oxford Federal Correctional Institution and formerly housed at the United States Penitentiary in Leavenworth, Kansas (USP-Leavenworth). Plaintiff has filed a complaint alleging that a guard at Leavenworth sexually assaulted him and that a number of other prison officials at Leavenworth failed to protect him. The court determined that plaintiff qualifies for *in forma pauperis* status, and plaintiff paid the initial partial filing fee set by the court. Dkt. 6.

The next step is for the court to screen the complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief can be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915. When screening a pro se litigant's complaint, the court construes the allegations liberally and in the plaintiff's favor. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010). I will grant plaintiff leave to proceed against defendants Rodgers and Crooks, but I will dismiss his claims against all remaining defendants for failure to comply with Federal Rule of Civil

Procedure 8. Before serving the complaint, I will allow plaintiff to file an amended complaint that addresses the issues I identify in this order.

ALLEGATIONS OF FACT

I draw the following facts from plaintiff's complaint. Dkt. 1.

While plaintiff was incarcerated at USP-Leavenworth, defendant Rodgers, a third-shift guard, sexually assaulted plaintiff. Rodgers watched plaintiff and masturbated outside of plaintiff's room. On several occasions, he asked to see plaintiff's penis, and at one point he grabbed plaintiff's penis while performing a pat down search.

Plaintiff reported the incidents to someone named Whitney (not named as a defendant) and to defendant Murelley, who appears to be a prison psychologist. Plaintiff claims that he tried to call "P.R.E.A.," but defendant Lieutenant Crooks would not let him. Defendant Troll, a nurse, was "there," although it is unclear where or when "there" is. Defendant Wettloffer told plaintiff that Rodgers had done things like that before, and he asked plaintiff to wear a camera and a microphone (presumably to catch Rodgers in the act); plaintiff refused. Defendants Lieutenant Davis and Lieutenant Lienheart also knew that defendant Rodgers was doing these things.

In a seemingly unrelated allegation, plaintiff states that he was denied medical care for his back "while in the hole." *Id.* at 4.

ANALYSIS

A. Plaintiff's complaint

Plaintiff brings Eighth Amendment claims against defendants, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[1] "In *Bivens* the Supreme Court recognized an implied cause of action for damages against federal officers to redress a constitutional violation[.]" *Engel v. Buchan*, 710 F.3d 698, 703 (7th Cir. 2013).

The Eighth Amendment "requires prison officials to take reasonable measures to guarantee the safety of the inmates and to protect them from harm at the hands of others." *Boyce v. Moore*, 314 F.3d 884, 888 (7th Cir. 2002) (citations and internal quotation marks omitted). A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment "only when a guard is deliberately indifferent to a substantial risk of serious harm." *Riccardo v. Rausch*, 375 F.3d 521, 525 (7th Cir. 2004). A prison official is deliberately indifferent if he "knew of a serious danger to [the prisoner] (really knew—not just should have known, which would be all that would be required in a negligence case) and could easily have prevented it from materializing but failed to do so[.]" *Case v. Ahitow*, 301 F.3d 605, 605 (7th Cir. 2002); *see also Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (Deliberate indifference requires "a showing that the official was subjectively aware of the risk."). In other words, a prison official is deliberately indifferent to a substantial risk of serious harm if the official "effectively condones the attack by allowing it to happen."

[1] Plaintiff cannot proceed under 42 U.S.C. § 1983 because defendants are federal, not state, actors. 42 U.S.C. § 1983; *London v. RBS Citizens, N.A.*, 600 F.3d 742, 746 (7th Cir. 2010) (stating that "§ 1983 actions may only be maintained against defendants who act under color of state law").

Santiago v. Walls, 599 F.3d 749, 756 (7th Cir. 2010) (citation and internal quotation marks omitted).

Plaintiff alleges that defendant Rodgers sexually assaulted him, and I will grant plaintiff leave to proceed on an Eighth Amendment claim against him. Plaintiff also alleges that defendant Crooks interfered with his attempt to report Rodgers (plaintiff references the P.R.E.A., which I will construe as a reference to the Prison Rape Elimination Act), and I will allow plaintiff to proceed against him, as well. But plaintiff has not sufficiently alleged that any of the other defendants violated the Eighth Amendment.

Plaintiff does not allege that defendants Wettloffer or Troll failed to protect him, or did anything to harm him for that matter. Plaintiff alleges that defendant Wettloffer attempted to help plaintiff by asking him to wear a camera and a microphone, and that defendant Troll was simply around at some point. Plaintiff's allegations are either innocuous or too vague for me to be able to determine whether these actions constitute a failure to protect him from harm. Plaintiff has failed to state an Eighth Amendment claim against these defendants: he has not alleged any facts that suggest that these defendants were deliberately indifferent to a substantial risk of serious harm.

Plaintiff comes closer to stating a claim against defendants Murelley, Davis, and Lienheart, as he appears to allege that they knew about Rodgers, but his allegations still fall short of stating an Eighth Amendment failure to protect claim against these defendants. Plaintiff alleges that these three defendants knew about Rodgers: plaintiff reported at least one incident to defendant Murelley, and defendants Davis and Lienheart generally "knew" about Rodgers's practices. But, as discussed above, to state an Eighth Amendment failure to protect claim, plaintiff must allege that defendants knew that Rodgers posed a substantial

risk of serious harm to plaintiff, that they could have prevented it, and that they declined to intervene. Plaintiff's allegations are conclusory and vague, and I am unable to determine what these defendants actually knew, when they knew it, and whether they had the opportunity to protect plaintiff but deliberately declined to intervene.

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint "must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is." *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 775 (7th Cir. 1994). At this point, plaintiff has not stated an Eighth Amendment failure to protect claim against defendants Wettloffer, Troll, Murelley, Davis, or Lienheart, and I will dismiss his claims against them for failing to satisfy Rule 8's pleading standard. I will allow plaintiff to file an amended complaint that specifically describes how these defendants failed to protect plaintiff, including what they knew about Rodgers and when. And he must include specific factual allegations that identify what each individual defendant did to rise to the level of deliberate indifference.

Plaintiff also attempts to bring an Eighth Amendment claim for failure to provide adequate medical care. The Eighth Amendment also prohibits prison officials from acting with deliberate indifference toward prisoners' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. *Johnson v. Snyder*, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it is life threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, significantly affects an individual's daily

activities, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm. *Farmer*, 511 U.S. at 847. For a defendant to be deliberately indifferent to such a need, he or she must know of the need and disregard it. *Id*. at 834. But "the Eighth Amendment is not a vehicle for bringing claims for medical malpractice." *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996). A plaintiff must demonstrate more than mere negligence by a defendant. *Farmer*, 511 U.S. at 835.

Plaintiff's claim for failure to provide adequate medical care is severely underdeveloped. Plaintiff has not alleged that he suffered from a serious medical need or how prison officials were deliberately indifferent to it. And plaintiff does not even say *who* was deliberately indifferent. I will dismiss plaintiff's Eighth Amendment medical care claim for failure to comply with Rule 8. If plaintiff intends to pursue this claim, he will need to specifically identify who was deliberately indifferent to his serious medical need, what his serious medical need was, and how, exactly, the culpable prison official(s) acted with deliberate indifference. Also, I will warn plaintiff that it is unlikely that he will be able to bring his medical care claim in this lawsuit, which is about sexual assault.

Finally, plaintiff does not specifically implicate defendants Claud May, A.W. Loftness, C.P.R.L. Schupe, or C.P.R.L. Drinkard. After he names them as defendants, he never mentions them again. I will dismiss them from this case.

B. Motion for assistance in recruiting counsel

Plaintiff has also filed a motion for assistance in recruiting counsel. Dkt. 8. Plaintiff states that he does not believe that he is sufficiently educated to prosecute his claims by himself. I will deny plaintiff's motion without prejudice to him renewing his request later in this case. Litigants in civil cases do not have a constitutional right to a lawyer, and the court

has discretion to determine whether assistance recruiting counsel is appropriate in a particular case. *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007). To prove that assistance is necessary, this court generally requires that a pro se plaintiff: (1) provide the names and addresses of at least three lawyers who declined to represent him in this case; and (2) demonstrate that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his demonstrated ability to prosecute it. *Id.* at 655; *see also Young v. Cramer*, No. 13-cv-77, 2013 WL 5504480, at *2 (W.D. Wis. Oct. 3, 2013).

Not only has plaintiff failed to demonstrate that he has made any effort to locate an attorney, but it is too early in the case to determine whether the legal and factual difficulty of the case exceeds plaintiff's ability to prosecute it. The case has not passed screening, much less the relatively early stage in which defendants may file a motion for summary judgment based on exhaustion of administrative remedies, which could result in dismissal of this case before it advances very far. Should the case pass the exhaustion stage, and should plaintiff continue to believe that he is unable to litigate the case himself, then he may renew his motion.

ORDER

IT IS ORDERED that:

1. Plaintiff Bryan Richard Howard is GRANTED leave to proceed on an Eighth Amendment claim against defendants Rodgers and LT Crooks. But I will wait to order service of the complaint until he has had the opportunity to amend his allegations against the remaining defendants.

2. Plaintiff's Eighth Amendment failure to protect claims against defendants SIA Wettloffer, SIS Lienheart, LT Davis, R.N. Troll, and Psych Murelley are DISMISSED for failure to comply with Federal Rule of Civil Procedure 8.

3. Plaintiff's Eighth Amendment failure to provide adequate medical care claim is DISMISSED for failure to comply with Federal Rule of Civil Procedure 8.

4. Plaintiff may have until August 30, 2016, to file an amended complaint that addresses the Rule 8 problems articulated in this opinion. If plaintiff does not timely file an amended complaint, he will proceed only on his claims against defendants Rodgers and Crooks.

5. Plaintiff is DENIED leave to proceed against Claud May, A.W. Loftness, C.P.R.L. Schupe, and C.P.R.L. Drinkard, and they are DISMISSED from this case.

6. Plaintiff's motion for assistance in recruiting counsel, Dkt. 8, is DENIED without prejudice.

Entered August 9, 2016.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge