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

REO COVINGTON,

Plaintiff,

v.

DR. TANNEN,

Defendants.

OPINION AND ORDER

16-cv-817-wmc

Pro se plaintiff Reo Covington filed a civil action contending that prison staff at the Oshkosh and Racine Correctional Institutions violated his rights under the U.S. Constitution, federal statutes and state law. On September 26, 2016, the court issued an order explaining that Covington's complaint violated Rule 20 of the Federal Rules of Civil Procedure because he had asserted multiple, unrelated claims in one lawsuit. Covington subsequently requested that his claims be divided into two lawsuits. In case no. 16-cv-217-wmc, he brought claims regarding denial of access to the Early Release Program. In this case, 16-cv-817-wmc, he seeks leave to proceed on claims that Dr. Tannen sexually assaulted him while he was incarcerated at the Oshkosh Correctional Institution. Covington subsequently moved to file an amended complaint (dkt. #7), including a proposed amended complaint (dkt. #8). That motion will be granted, and so his amended complaint against defendant Tannen is now before the court for screening under 28 U.S.C. § 1915A. Because plaintiff's allegations support a constitutional claim against Dr. Tannen, if barely, Covington's claim will be allowed to proceed past the screening stage.

ALLEGATIONS OF FACT[1]

On March 7, 2016, Dr. Tannen saw Covington in the health services unit at the Oshkosh Correctional Institution. During that appointment, Covington asked Tannen to examine a painful "bump on his rear" to determine whether Covington had hemorrhoids. During the examination, Covington felt something being inserted into his rectum. Covington is not sure whether Tannen inserted his finger or something else, but was shocked because he had not expected an invasive exam and had not given the doctor permission to put anything into his rectum. Covington further alleges that he would have refused such an exam had he been asked. After the exam, Covington left Tannen's office without further incident.

Covington reported the incident to psychological services and spoke with an intern about it. He also spoke with staff responsible for enforcing the Prison Rape Elimination Act. Since the incident, Covington has been afraid to go to the health services unit to receive needed medical treatment, and he has suffered from anxiety, post-traumatic stress disorder and other mental health problems.

Although not part of his allegations, the Mayo Clinic states that for hemorrhoid diagnosis:

> Your doctor may be able to see if you have external hemorrhoids simply by looking. Tests and procedures to diagnose internal hemorrhoids may include examination of your anal canal and rectum:

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the following facts based on the allegations in Covington's amended complaint (dkt. #8) when viewed in a light most favorable to the plaintiff.

- Digital examination. During a digital rectal exam, your doctor inserts a gloved, lubricated finger into your rectum. He or she feels for anything unusual, such as growths. The exam can suggest to your doctor whether further testing is needed.

- Visual inspection. Because internal hemorrhoids are often too soft to be felt during a rectal exam, your doctor may also examine the lower portion of your colon and rectum with an anoscope, proctoscope or sigmoidoscope.

https://www.mayoclinic.org/diseases-conditions/hemorrhoids/diagnosis-treatment/drc-20360280 (last viewed March 28, 2018).

OPINION

The Eighth Amendment's prohibition on cruel and unusual punishment bars unnecessary and wanton infliction of pain on inmates. *See Hope v. Pelzer*, 536 U.S. 730, 737 (2002); *Whitman v. Nesic*, 368 F.3d 931, 934 (7th Cir. 2004). Prison staff can violate this prohibition by maliciously inflicting pain or injury, *see Guitron v. Paul*, 675 F.3d 1044, 1046 (7th Cir. 2012), or by performing some action that is "intended to humiliate the victim or gratify the assailant's sexual desires." *See Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012); *Gillis v. Pollard*, 554 Fed. Appx. 502, 505 (7th Cir. 2014). Here, plaintiff claims that defendant Tannen violated the Eighth Amendment when he inserted something into plaintiff's rectum without permission during a medical examination for potential hemorrhoids.

While no doubt plaintiff felt humiliated and even offended, plaintiff's allegations are barely sufficient to permit an inference that *Dr. Tannen acted with an intent* to humiliate plaintiff, but not to inflict pain or injury, or to gratify his own sexual desires. For example,

plaintiff does not allege that the touching was painful, lasted for an unnecessarily long time, that Tannen said anything inappropriate, nor that Tannen otherwise behaved in any way to suggest that the touching was for his own sexual gratification. Perhaps most significant, plaintiff does not suggest that Tannen's actions were improper in the context of an examination for hemorrhoids or other rectal issues, although this still might be inferred given plaintiff's complaint was allegedly for an external hemorrhoid.

The lack of such allegations distinguishes plaintiff's allegations from those in which plaintiffs have been permitted to proceed on sexual assault claims under the Eighth Amendment. For example, in *Washington*, 695 F.3d at 643, the Seventh Circuit held that a prisoner's allegations were sufficient because the prisoner alleged that a guard had spent "five to seven seconds gratuitously fondling the plaintiff's testicles and penis through the plaintiff's clothes and then, while strip searching him, fondling his nude testicles for two or three seconds . . . again without any justification." Similarly, the Seventh Circuit found in *Rivera v. Drake*, 497 Fed. Appx. 635, 637-38 (7th Cir. 2012), that a prisoner's allegations were sufficient because he alleged that a guard inserted his finger into the prisoner's anus during a standard strip search, causing him humiliation and substantial pain, and without any legitimate justification. Finally, in *Sloan v. Bohlmann*, 2011 WL 830544, *3 (E.D. Wis. 2011), the plaintiff was permitted to proceed based on allegations that a doctor had moved his finger in and out of the plaintiff's rectum multiple times, during an exam, while asking questions like "how does that feel?" and "does that make you feel like you are going to ejaculate?"

In contrast to the above cases, plaintiff's claim against Dr. Tannen seems to be based entirely on plaintiff's surprise that Tannen inserted something into his rectum without providing warning or obtaining consent. The court certainly understands how Tannen's behavior could have been surprising and embarrassing to plaintiff, and further agrees that warning and consent should have been obtained before performing a rectal examination, particularly when plaintiff complained of an *external* hemorrhoid, but plaintiff's allegations are insufficient to sustain a constitutional claim against Tannen, at least without some allegation permitting an inference that he acted with an intent to cause pain, injury or to obtain sexual gratification.

Still, however unlikely, a reasonable trier of fact could infer that Dr. Tannen's intent was to surprise and humiliate plaintiff by suddenly performing a rectal exam without explanation or consent when allegedly examining an external hemorrhoid. While plaintiff will be allowed to proceed with his amended complaint past screening, he should undertand that his burden of proof will be much greater as this case proceeds, and it will be his burden to submit proof that Tannen *intended* to humiliate him.

ORDER

IT IS ORDERED that:

(1) Plaintiff's motion for leave to file an amended complaint (dkts. ##7, 8) is GRANTED.

(2) Plaintiff Reo Covington is GRANTED leave to proceed on a constitutional claim against defendant Dr. Tannen.

(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 defendant. Under the agreement, the Department of Justice will have 60 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 defendant.

(4) For the time being, plaintiff must send the defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendant, he should serve the lawyer directly rather than the defendant. 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 defendant or to defendant's 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's address changes while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 28th day of March, 2018.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge