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

JAMES EDWARD GRANT,

Plaintiff,

v.

ORDER

MR. GILL, MR. BEAHM, JESSE SCHNEIDER, BRIAN GREFF, GABE UMENTUM, MR. SCHOUTEN, MR. LUNDE, MR. MARIWITZ, MR. OLIG, MR. KITZMAN, and TONY MELI,[1]

14-cv-436-jdp

Defendant.

Plaintiff James Edward Grant, a former state of Wisconsin inmate currently living in Madison, filed this lawsuit alleging that he was sexually assaulted during a strip search while housed at the Waupun Correctional Institution (WCI). I dismissed both plaintiff's original complaint and first amended complaint for failing to comply with Federal Rule of Civil Procedure 8. In particular, I explained to plaintiff that he would need to explain the details of the strip search itself so that defendants and the court could understand plaintiff's claims. See Dkt. 2, at 2-3; Dkt. 14, at 2. Plaintiff also larded his first amended complaint with various seemingly unrelated misdeeds by more than 40 defendants. I gave plaintiff a final chance to explain the basis for his claims.

Plaintiff has filed a more succinct second amended complaint, Dkt. 15, that I must now screen. In doing so, I must dismiss any portions that are legally frivolous, malicious, fail to state a claim upon which relief may be granted, or ask for money damages from a

[1] Plaintiff's original complaint included Jesse Schneider as a defendant. Plaintiff's second amended caption is virtually identical but does not include Schneider even though plaintiff includes allegations against Schneider in the body of the second amended complaint. I assume that this is an oversight on plaintiff's part and I will keep Schneider as a defendant.

defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915. 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) (per curiam).

After considering plaintiff's allegations, I conclude that he may proceed on claims that defendants retaliated against him, used excessive force on him, and unnecessarily strip searched him.

ALLEGATIONS OF FACT

The events in question took place while plaintiff was a prisoner at the Waupun Correctional Institution. On May 15, 2014, defendant Jeffrey Gill (who I take to be a correctional officer), passed out breakfast trays to inmates. When Gill got to plaintiff's cell, he asked plaintiff if he was going to his "full due process hearing" that day. I take this to mean that plaintiff had a hearing on a disciplinary charge.

Later, when it was time for plaintiff to go to his disciplinary hearing, defendant Gill told plaintiff in a "malicious and very vindictive" tone of voice, "If you look at me, I will interpret that as a threat." Gill placed handcuffs on plaintiff tightly. Plaintiff believes that this was malicious.

Plaintiff's escort was recorded by defendant Mr. Olsen. Plaintiff spoke into the camera, stating about how defendants Gill and Joseph Beahm had broken another inmate's thumbs. Gill then started squeezing plaintiff's arm, causing him severe pain. When plaintiff told Gill that he was hurting him, Gill "denied and/or simply minimized his actions and/or behavior."

Plaintiff arrived at room no. 5. Plaintiff looked down to observe Gill handcuffing him to the tether in the room. I take plaintiff to be saying that this angered Gill. Gill threw plaintiff against the wall, injuring plaintiff's chin. Gill repeatedly said, "Stop resisting." Defendant Gabriel Umentum ran into the room with leg shackles and cuffed plaintiff's legs. This happened even though plaintiff never heard Gill or Olsen call for assistance.

Plaintiff was taken to a strip cage. Plaintiff was handcuffed to the cage, which caused him severe pain. Defendant Beahm cut plaintiff's clothes off his body. Beahm touched plaintiff's testicles with the back of his band, and used both hands to spread plaintiff's buttocks, which plaintiff says caused pain to his anus. Beahm also "forcefully" spread plaintiff's fingers apart and then placed his fingers in plaintiff's mouth. Defendant Olsen recorded the strip search. Defendants Mr. Schouten, Michael Lunde, Mr. Marwitz, Todd Olig, and Mr. Kitzman assisted in the strip search.

At some point "[w]hile [plaintiff] was being victimized and violated," which I take to mean during his strip search, he asked defendant Jesse Schneider, "What about my hearing?" Schneider sarcastically replied, "It will be rescheduled." While plaintiff was speaking to Schneider, he noticed defendant Brian Greff's presence in the room.

Plaintiff was given a conduct report for these events by defendant Meli.

ANALYSIS

A. Retaliation

Plaintiff's allegations raise a number of potential claims. Plaintiff says that defendants conspired to take the above actions against him to prevent him from attending his conduct

report hearing. I take him to be saying that they retaliated against him for choosing to exercise his right to defend himself in a conduct report hearing.

To state a claim for retaliation under the First Amendment, a plaintiff must identify: (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by the defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff's protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009). Plaintiff has the right to choose to defend himself against a conduct report, and I can reasonably assume that excessive force, unnecessary strip search, and false conduct reports could deter a person in plaintiff's position from wanting to defend himself in the future.

The most difficult prong for plaintiff is the connection between the protected activity and defendants' alleged actions. But construing plaintiff's allegations generously, I conclude that he has alleged enough to raise a plausible connection: he seems to be saying that Gill took particular interest in plaintiff's participation in the conduct report hearing and was ready to take action against plaintiff if he did anything that could be portrayed as remotely provocative. Gill was then unnecessarily rough with plaintiff, and plaintiff was sent to a strip cage without Gill even calling for help, which suggests that the other defendants, all of whom were present for some of the events in question, yet failed to intervene, were in on the plan to harass plaintiff by strip searching him and giving him an additional conduct report for no reason. Accordingly, I will allow plaintiff to proceed on retaliation claims against all of the defendants.

But plaintiff should be aware that it will be much harder for him to prevail at summary judgment or trial than it was for him to proceed with these claims at screening. Plaintiff will have to support each of the elements of a retaliation claim with evidence proving his claims. In particular, to prevail against a particular defendant on a retaliation claim, plaintiff will have to show that the defendant acted the way he did in an effort to *retaliate* against plaintiff, rather than merely reacting to a call for help, otherwise acting in the normal course of their duties, or even acting out of animus toward plaintiff unrelated to his conduct report hearing.

B. Excessive force

Plaintiff alleges that defendant Gill used unnecessary force against him at several points during his escort. "The unnecessary and wanton infliction of pain on a prisoner violates his rights under the Eighth Amendment." *Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009) (internal quotation omitted). To prevail on a claim of excessive force against a correctional officer, a plaintiff must prove that the officer applied force "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The factors relevant to this determination include (1) why force was needed; (2) how much force was used; (3) the extent of the injury inflicted; (4) whether the defendant perceived a threat to the safety of staff and prisoners; and (5) whether efforts were made to temper the severity of the force. *Whitley*, 475 U.S. at 321.

Although correctional officers are allowed to use some force in obtaining compliance with their orders, plaintiff's allegations about defendant Gill's actions are sufficient to state an excessive force claim against him. Because plaintiff is alleging that defendant Olsen

recorded the escort but did not intervene in any of Gill's actions, I will allow him to proceed on a claim against Olsen as well. But at summary judgment or trial, plaintiff will have to show that Olsen could have done something to stop Gill from using excessive force.

C. Strip search

A strip search violates the Eighth Amendment when it is "conducted in a harassing manner intended to humiliate and inflict psychological pain." *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003); *Fillmore v. Page*, 358 F.3d 496, 505 (7th Cir. 2004). Stated another way, the question is whether there was a legitimate penological reason for both the search and its scope. *Whitman v. Nesic*, 368 F.3d 931, 934-35 (7th Cir. 2004); *see also Vasquez v. Raemisch*, 480 F. Supp. 2d 1120, 1131-32 (W.D. Wis. 2007) (stating that case law "supports a conclusion of heightened protection for a manual as opposed to visual inspection.").

In his original complaint, plaintiff described the strip search as a sexual assault. He does not use that phrase in his second amended complaint, and much of what plaintiff describes does not appear to be inconsistent with the normal techniques used in performing a manual strip search of a prisoner. But he does reference being "violated." So, construing plaintiff's allegations generously, I conclude that he was stated just enough to raise claims that defendants chose to give him an invasive manual search to humiliate him rather than for a legitimate purpose, and that Beahm was unnecessarily rough with plaintiff in a way that served only to humiliate him. I will also allow plaintiff to proceed against the other defendants who were present during the strip search, who did nothing to stop Beahm from conducting the search in an inappropriate manner. From plaintiff's allegations, I can infer that defendants Olsen, Schouten, Lunde, Marwitz, Olig, Kitzman, Schneider, and Greff were

present. Because plaintiff does not say that defendants Gill or Umentum were present during the strip search, I do not consider them to be part of these claims.

A final note about the strip search. Strip search claims in this court usually involve the theory that prison officials conducted a search in a manner intended to *humiliate* plaintiff. As stated above, that may be the case here. But plaintiff also seems to be saying that Beahm applied unnecessary *force* during the search, which could possibly support an excessive force theory of recovery as well as the prototypical humiliation claims. It is unclear whether plaintiff would like to pursue such a theory. As the record is developed, it should become clearer whether this is a tenable theory of recovery. Plaintiff will eventually have to decide whether he intends to bring an excessive force claim based on the strip search, and defendants are on notice that this issue may have to be addressed in more detail later.

D. Order for provision of legal materials

Plaintiff has also filed a motion explaining that he was about to be released from the Wisconsin Resource Center and placed in extended supervision in the Madison area. Later filings from plaintiff in other cases confirm that he has been released. Plaintiff states that he will have no public law library access, he would be arrested for trespassing if he attempted to use the University of Wisconsin Law Library, and he asks for a court order directing the Department of Corrections to provide plaintiff with a laptop, access to the Lexis legal database, printer, mobile phone, and cash for books, postage, and "basic needs and or necessities." Dkt. 16. I have already denied the identical motion in case no. 15-cv-572-jdp:

> Plaintiff's premise that he has no public law library access is likely incorrect; he either is not aware of the State Law Library and Dane County Law Library, both located in downtown Madison, or he is aware that those libraries exist but fails to explain why he cannot use those facilities. In any event, plaintiff does not explain how state officials are keeping him from

> litigating this lawsuit, there is no reason to think that he is in appreciably worse position than any member of the public attempting to litigate a civil action on his or her own, and his requests are exceedingly unrealistic.

Dkt. 17 in the '572 case, at 5. I will deny plaintiff's current motion for the same reasons.

ORDER

IT IS ORDERED that:

1. Plaintiff James Edward Grant is GRANTED leave to proceed on the following claims:

   - First Amendment retaliation claims against defendants Gill, Olsen, Beahm, Umentum, Schouten, Lunde, Marwitz, Olig, Kitzman, Meli, Schneider, and Greff.

   - Eighth Amendment excessive force claims against defendants Gill and Olsen.

   - Eighth Amendment strip search claims against defendants Beahm, Olsen, Schouten, Lunde, Marwitz, Olig, Kitzman, Schneider, and Greff.

2. The clerk of court is directed to add defendant Olsen to the caption.

3. Plaintiff's motion for an order directing the DOC to provide him with legal materials, Dkt. 16, is DENIED.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's second amended 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.

5. 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.

6. 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.

7. If plaintiff moves 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 August 9, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge