

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

DOMINIQUE DEWAYNE GULLEY-
FERNANDEZ,

Plaintiff,

v.

OPINION AND ORDER

19-cv-354-wmc

MARK HEISE, Director of the Bureau of
Classification and Movement,

Defendant.

Pro se plaintiff Dominique Dewayne Gulley-Fernandez, a prisoner at the Wisconsin Secure Program Facility (“WSPF”), has filed a proposed complaint under 42 U.S.C. § 1983. Gulley-Fernandez claims that defendant Mark Heise violated his Eighth and First Amendment rights by repeatedly ignoring his requests for a transfer to an institution where he would not be sexually harassed and assaulted by other prisoners. Gulley-Fernandez’s amended complaint is ready for screening required by 28 U.S.C. §§ 1915(e)(2), 1915A, and he has also filed a motion to transfer this case to the Eastern District of Wisconsin (dkt. #21), which the court is denying. For the reasons that follow, the court will allow Gulley-Fernandez to proceed on Eighth and First Amendment claims against Heise, but will deny his motion to transfer.

ALLEGATIONS OF FACT¹

Dominique DeWayne Gulley-Fernandez is currently incarcerated at WSPF, where

¹ In addressing a pro se litigant’s complaint, the court must read the allegations generously, resolving ambiguities and drawing reasonable inference in plaintiff’s favor. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

the events comprising his claims took place. While the court understands that Gulley-Fernandez is a transgender woman, since in his complaint he refers to himself using male pronouns, the court will refer to him in the same manner.² Defendant Mark Heise is employed by the Wisconsin Department of Corrections as the Director of the Bureau of Offender Classification and Movement (“BOCM”), located in Madison, Wisconsin.

Gulley-Fernandez alleges that since 2014, he has filed numerous Prison Rape Elimination Act (“PREA”) complaints about incidents that have occurred at WSPF that have been deemed substantiated by PREA coordinators. However, he was not transferred out of WSPF until July of 2019, despite ongoing sexual harassment, physical assaults and discrimination by other prisoners and WSPF staff. Although he was transferred to Jackson Correctional Institution at that point, he was transferred back to WSPF in June of 2020.

Gulley-Fernandez holds Heise accountable for his continued placement at WSPF. He alleges that he wrote to Heise on “numerous occasions,” to no avail. His complaint outlines three such instances in which Heise failed to respond to his specific reports about prisoner assaults at WSPF.

First, on February 29, 2016, three prisoners attacked Gulley-Fernandez in a weight room in front of Correctional Officer Brown-Lucas, who delayed intervening for so long that Gulley-Fernandez ended up with a swollen eye and severe injuries to his lip, nose, chest and back. After the incident, Brown-Lucas told Gulley-Fernandez that if he told security staff about what happened, he would “make sure the same inmates gang rape him.”

² To the extent plaintiff would prefer the court use female pronouns, plaintiff should so indicate in his next filing.

(Am. Comp. (dkt. #13) ¶ 5.) On March 4, 2016, Gulley-Fernandez wrote a two-page letter to Heise, asking for an immediate transfer “due to being physically assaulted by several inmates . . . and that he fears for his safety at WSPF.” (*Id.* ¶ 6.) Heise never responded to that letter.

Second, on April 27, 2016, Gulley-Fernandez was in his cell in the morning when the cell door opened and three prisoners jumped him. On May 1, 2016, Gulley-Fernandez wrote to Heise again, reported what happened on April 27 and repeated his request for a transfer. Heise did not respond.

Third, on August 1, 2016, Gulley-Fernandez was again attacked in his cell by two prisoners, who came in, jumped on him and called him a “faggot . . . ass . . . dick sucker.” (*Id.* ¶ 9.) They also told him they would “gang rape him and shank him up.” (*Id.*) On August 25, 2016, Gulley-Fernandez wrote to Heise again, informing him about what happened on August 1. Again, Heise did not respond.

Gulley-Fernandez claims that Heise’s deliberate indifference is intended to punish him for his previous lawsuits, *Gulley-Fernandez v. Wisconsin Department of Corrections*, No. 15-cv-995 (E.D. Wis.), and *Gulley-Fernandez v. Johnson*, No. 15-cv-795 (E.D. Wis.). While Heise was initially named as a defendant in the ’795 lawsuit, he was omitted from the amended complaint in that lawsuit. The record of both lawsuits show that in 2015 and 2016, Gulley-Fernandez wrote letters to Heise about his placement hearings that referenced his lawsuits. *See Gulley-Fernandez*, No. 15-cv-995, dkt. #19; *Gulley-Fernandez*, No. 15-cv-795, dkt. ##31, 125, 128.

OPINION

Plaintiff seeks to proceed against Heise on claims under the Eighth Amendment, and because he references Heise's retaliation, the court will evaluate whether his allegations state a First Amendment retaliation claims against him as well.³ Construing plaintiff's allegations generously, his allegations are sufficient for him to proceed on both claims.

The Eighth Amendment requires prison officials to ensure that "reasonable measures" are taken to guarantee inmate safety and prevent harm. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). An inmate may prevail on a failure to protect claim by proving that (1) he faced a "substantial risk of serious harm" and (2) the identified prison officials acted with "deliberate indifference" toward that risk. *Id.* at 834.

Plaintiff's allegations about his substantiated PREA complaints and the three 2016 attacks by other prisoners support a reasonable inference that during the relevant time period, he was facing a substantial risk of serious harm. Plaintiff's allegations sufficiently implicate Heise's personal involvement, since plaintiff specifically alleges that he reported to Heise that he had been attacked and threatened on three separate occasions in 2016, but never received a response or was transferred to a different institution. While the facts may bear out that Heise delegated the responsibility of handling correspondence of this type to another individual in the BOCM, and thus that Heise was never actually aware

³ In his prayer for relief, Gulley-Fernandez requests an emergency order requiring his transfer from WSPF to a medium security institution. When he was transferred back to WSPF in June of 2020, he requested a hearing but did not actually allege that the harassment or threats have continued. If Gulley-Fernandez continues to believe that he is at risk of harassment or assault and seeks injunctive relief, he may file a motion for a preliminary injunction and is advised to use the court's procedures for obtaining preliminary injunctive relief, which the court attaches to this order.

about plaintiff's correspondence, at this stage the court will accept that Heise did, in fact, receive plaintiff's letters. It follows that Heise's apparent failure to respond and plaintiff's continued placement at WSPF permits a reasonable inference that Heise acted with deliberate indifference to the continued risk plaintiff was facing at WSPF. Accordingly, while the court suspects that factual development may reveal more about the reason for plaintiff's placement at WSPF, and whether WSPF staff adjusted his placement after the attacks in an appropriate manner, plaintiff may proceed against Heise.

Additionally, while proving this claim will be very difficult, the court will grant plaintiff leave to proceed against Heise on a First Amendment retaliation claim. To state a claim for retaliation, a plaintiff must allege that: (1) he engaged in activity protected by the Constitution; (2) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity; and (3) the treatment was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the protected activity in the future. *Gomez v. Randle*, 680 F.3d 859, 866-67 (7th Cir. 2012); *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009).

The court accepts that plaintiff's other lawsuits are constitutionally protected activity and his continued placement at WSPF following his assaults and requests for transfer is sufficiently adverse to deter a prisoner of ordinary firmness from filing a lawsuit again in the future. Additionally, while conclusory, plaintiff's assertion that Heise ignored his letters because of his previous lawsuits, of which Heise was aware, is sufficient to support an inference of retaliatory motive. *See Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002); *Henderson v. Wilcoxon*, 802 F.3d 930, 933 (7th Cir. 2015) (reaffirming *Higgs*

standard).

As plaintiff proceeds with this claim, he should be aware that to prove this claim he will likely need to come up with more evidence than his allegations in his complaint, *Sparing v. Vill. of Olympia Fields*, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 539 (7th Cir. 2007). Even when the exercise of the right and the adverse action occur close in time, this is rarely enough to prove an unlawful motive. *See, e.g., Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7th Cir. 2000) (“The mere fact that one event preceded another does nothing to prove that the first event caused the second.”). For that reason, plaintiff will have to come forward with specific evidence either at summary judgment or trial suggesting that Heise’s inaction was not motivated by a legitimate purpose.

Finally, the court is denying plaintiff’s request to transfer this lawsuit to the Eastern District of Wisconsin, since all relevant events took place at WSPF, which is located in this district, and the court has no basis to infer that venue would have been proper in the Eastern District of Wisconsin. *See* 28 U.S.C. §§ 1391(a),(b) (venue is proper in a district where one or more of the defendants reside or where a substantial part of events giving rise to a lawsuit occurred).

ORDER

IT IS ORDERED that:

- 1) Plaintiff Dominique Gulley-Fernandez is GRANTED leave to proceed on an Eighth Amendment claim and a First Amendment retaliation claim against defendant Heise, as provided above.

- 2) Plaintiff is DENIED leave to proceed on any other claim.
- 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 defendant. Under the agreement, the Department of Justice will have 60 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 defendant.
- 4) For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than 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 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 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 defendant or the court is unable to locate him, his case may be dismissed for failure to prosecute.
- 7) Plaintiff's motion for a change of venue (dkt. #21) is DENIED.
- 8) Plaintiff's motion for a status update (dkt. #20) is DENIED as moot.
- 9) The clerk of court is directed to forward plaintiff a copy of this court's procedures for obtaining injunctive relief.

Entered this 16th day of September, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge