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

DONTRE JOHNSON,

Plaintiff,

v.

BRIAN FOSTER,
DR. DE BLANC,
T. MOON, LINDA SCHNEIDER,
UHERKA, and JARED GRADY,

Defendants.

OPINION and ORDER

Case No. 18-cv-767-wmc

Pro se plaintiff Dontre Johnson, a prisoner at Waupun Correctional Institution ("Waupun"), filed this lawsuit under 42 U.S.C. § 1983, claiming that in May of 2013, defendants violated his constitutional rights during a strip search, as well as in refusing to allow him to use the bathroom. Johnson also filed a motion for leave to amend his original complaint, accompanied by a proposed amended complaint (dkt. ##12, 13). The court will grant and proceed to screen his amended complaint under 28 U.S.C. § 1915A. For the reasons that follow, the court will also grant Johnson leave to proceed on an Eighth Amendment claim defendants Don Uherka and Jared Grady.

ALLEGATIONS OF FACT[1]

Plaintiff Dontre Johnson names seven proposed defendants, all Waupun employees: Warden Brian Foster; Dr. Kristina DeBlanc, a psychiatrist; Inmate Complaint Examiner

[1] At the screening stage the court is required to accept plaintiff allegations as true, resolving ambiguities and drawing every reasonable inference in his favor. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 521 (1972).

("ICE") T. Moon; Linda Schneider, a sergeant who supervised a visiting room area; and Don Uherka and Jared Grady, correctional officers.

On May 27, 2018, Johnson alleges that he was called to Waupun's visiting area at about 3:50 p.m. At about 6:00 p.m., Johnson went to the officer's station and requested to use the restroom. When Officer Grady denied that request, because the only other officer present at that time was Schneider, Johnson went back to the visiting area and continued his visit for another 30 minutes, when he was told that his visit was over. Johnson was then ushered through the "strip cage" area by Officers Grady and Uherka.

At that point, Johnson was allegedly "strip frisked" by Uherka in accordance with policy, then directed to the holding area, which Johnson again describes as routine. After waiting for about 20 minutes to be returned to his cell, however, Johnson asked about the delay and opened a door labeled "Do Not Enter," calling for a guard and raising his voice. In response, Grady and Uherka allegedly came back to the holding area and chastised Johnson for opening the door. Johnson responded that he had to use the rest room, and Uherka told him that he would need to conduct another strip search before Johnson could use the restroom.

Johnson alleges that this second strip search was intended to punish and humiliate him. Specifically, Johnson alleges that during that second strip search, Uherka conducted the search extremely slowly, instructing Johnson to lift his testicles and hold them up for a longer time than Uherka had previously instructed. Uherka allegedly did the same thing when searching Johnson's anal and other body cavities. During this time, Grady stood

about 6 to 8 feet away. While Grady could not see Johnson, he did not say anything about the second search.

When the strip search was complete, Johnson received permission to use the restroom, although Officer Uherka required him to leave the door open. After Johnson used the toilet, he discovered that it was out of toilet paper. However, when Johnson asked for toilet paper, Uherka refused to get him any.

Uherka then brought Johnson to an observation cell, explaining that the sergeant wanted to speak with him. After Sergeant Schneider came to his cell, Johnson asked him why he was being held there and complained about the second strip search. Even so, Schneider was allegedly only interested in discussing Johnson's decision to open a door labeled "Do Not Enter." Allegedly, seven days later, Johnson received a conduct report for being threatening, disruptive, and disobeying orders.

On June 29, Johnson filed a grievance about the incident with ICE. Moon accepted the grievance, but recommended dismissal because the matters outlined in Johnson's complaint were already the subject of a conduct report. Additionally, Johnson asked to speak with Dr. DeBlanc multiple times, but Dr. DeBlanc allegedly denied Johnson's request to be seen. While Johnson does not describe the reasons for his requests to be seen by Dr. De Blanc, but alleges that he was left emotionally distraught by DeBlanc's refusal to see him.

OPINION

The court understands plaintiff to be pursuing claims against defendants for (1) denying him access to the bathroom for a long period of time, (2) the manner in which Uherka conducted a second strip search, and (3) how Grady, Schneider, Moon, De Blanc and Foster responded to his complaints about those incidents and requests for psychological care.

As an initial matter, the court will not grant Plaintiff leave to proceed on any claim related to his inability to use the bathroom and lack of access to toilet paper. The Eighth Amendment guarantees prisoners "humane conditions of confinement," and it requires that prison officials take reasonable measures to guarantee prisoner safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Certainly, "[a]dequate food and facilities to wash and use the toilet are among the minimal civilized measure of life's necessities that must be afforded prisoners." *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 670 (7th Cir. 2012) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

To prove that prison conditions violated the Eighth Amendment, however, a plaintiff must allege facts that satisfy a test involving both an objective and subjective component. *Farmer*, 511 U.S. at 834. The objective analysis focuses on whether prison conditions were sufficiently serious to exceed "contemporary bounds of decency of a mature, civilized society." *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994). The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to plaintiff. *Id*. "Deliberate indifference" means that the defendant knew that the plaintiff faced a substantial risk of serious harm

and yet disregarded that risk by failing to take reasonable measures to address it. *Farmer*, 511 U.S. at 847. Thus, it is not enough for plaintiff to prove that a defendant acted negligently or should have known of the risk. *Pierson v. Hartley*, 391 F.3d 898 (7th Cir. 2004). He must show that the official received information from which an inference could be drawn that a substantial risk existed *and* that the official actually drew the inference. *Id*. at 902.

Even accepting that Plaintiff experienced discomfort at having to wait to use the bathroom for approximately one hour, this condition is not so objectively egregious to amount to outright *denial* of his access to adequate bathroom facilities. Rather, his allegations suggest that he suffered from the type of "occasional discomfort that is part of the penalty that criminal offenders pay for their offenses against society." *Lunsford v. Bennett*, 17 F.3d 1574, 1581 (7th Cir. 1994); *see also Thomas v. Cox*, No. 10-cv-997-GPM, 2011 WL 3205660, at *3 (S.D. Ill. July 27, 2011) (finding that plaintiff's allegations that he had to wait to use the bathroom because of overcrowding insufficient to support an Eighth Amendment claim); *Clark v. Spey*, No. 01-C-9669, 2002 WL 31133198, at *2-3 (N.D. Ill. Sept. 26, 2002).

Moreover, plaintiff's allegations about how Officers Grady and Uherka handled his requests to use the bathroom do not support a reasonable inference of deliberate indifference. While Grady allegedly denied him immediate access to the bathroom, plaintiff *also* alleges that Grady denied his request *because* there was only one, other officer available in that area at the time. This acknowledged reason is not an obviously illegitimate

reason to deny his request temporarily, especially given that plaintiff has not alleged ***any*** details suggesting that he told Grady that his need to use the bathroom was urgent.

As such, it would be unreasonable to infer that Grady's response recklessly disregarded his risk of harm by denying him immediate access to a bathroom. Furthermore, while Uherka later refused to allow plaintiff to close the door to the bathroom and to provide him toilet paper, plaintiff has not alleged any facts supporting a reasonable inference that Uherka was acting with deliberate indifference; rather, plaintiff's allegations suggest that Uherka deemed it necessary to monitor plaintiff because he had acted disruptively in opening the "Do Not Enter" door. Given that plaintiff does not suggest that any other defendant knew he had to use the bathroom (at least before Uherka brought him to the bathroom), he may not proceed on this claim.

However, plaintiff may proceed on a claim related to Officer Uherka's alleged second strip search. A strip search in prison can violate the Eighth Amendment's prohibition against cruel and unusual punishment if "motivated by a desire to harass or humiliate rather than by a legitimate justification." *King v. McCarty*, 781 F.3d 889, 897 (7th Cir. 2015). The inmate must prove that the defendant conducted the search for the purpose of humiliating the inmate. *See id.* at 899 (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). The challenged search must be "calculated harassment" or "maliciously motivated" conduct unrelated to institutional security. *Whitman v. Nesic*, 368 F.3d 931, 934 (7th Cir. 2004); *accord Sparks v. Stutler*, 71 F.3d 259, 262 (7th Cir. 1995) ("The eighth amendment's mental-state requirement . . . supplies protection for honest errors.").

In employing the generous standard afforded to *pro se* plaintiffs, it is reasonable to infer that Uherka intended for the second strip search to humiliate plaintiff, because he allegedly conducted that search in an unnecessarily slow fashion and, at least as plaintiff describes it, that search was unnecessary. Therefore, the court will grant plaintiff leave to proceed against Uherka for his handling of the second strip search. Although a much closer question, plaintiff may also proceed against Grady past the screening stage, since it would not be unreasonable for a jury to infer, based on the alleged, unusual nature and length of the search, that Grady should have at least made an inquiry about, if not intervene to stop, the lengthy strip search, even if as alleged, Grady could not actually see plaintiff during the second strip search.

At the same time, plaintiff may not proceed with an Eighth Amendment claim against defendants Schneider, Moon, DeBlanc or Foster for their respective responses to plaintiff's subsequent complaints. While plaintiff describes Schneider's and Moon's responses as deliberate indifference, he has not pleaded any facts that give rise to an inference that plaintiff was facing an *on-going* threat of additional, inappropriate strip searches. As such, the jury would have no basis to infer that these defendants were on notice of the need to inquire about, much less required to take any further action with respect to, that incident. Similarly, while plaintiff claims that DeBlanc refused to see him repeatedly, he has provided no facts to suggest that refusal was unreasonable, including about the symptoms that he allegedly reported to DeBlanc. Therefore, it would not be reasonable to infer, even construing plaintiff's allegations generously and in his favor, that DeBlanc had reason to know that plaintiff was facing an objectively serious medical or

mental condition, or risk of harm, when he reached out to DeBlanc for mental health care. Accordingly, plaintiff may not proceed on a claim against DeBlanc either.

Finally, plaintiff seeks to proceed against Warden Foster because he allegedly affirmed Moon's dismissal of his grievance related to the alleged incident. However, plaintiff has not alleged that Foster failed to protect Plaintiff from further inappropriately-conducted strip searches. Nor can Foster be held liable by virtue of his position as warden alone, since a supervisory defendant cannot be held liable under § 1983 for a subordinate's conduct simply because of his or her position as a supervisor. *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001). To maintain a claim against a supervisory defendant, a plaintiff must allege facts showing that the supervisor had sufficient *personal* responsibility in the allegedly unconstitutional conduct. Said another way, the facts must support a finding that the supervisor "directed the conduct causing the constitutional violation, or . . . it occurred with [his] knowledge or consent." *Sanville v. McCaughtry*, 266 F.3d 724, 739-40 (7th Cir. 2001) (internal citations omitted). Since plaintiff does not allege that Foster knew of or was involved in any way in the potentially unconstitutional components of the strip search (or even that he knew about its allegedly inappropriate aspects afterwards), plaintiff may not proceed against him on this claim and he will be dismissed from this lawsuit.

ORDER

IT IS ORDERED that:

1. Plaintiff Dontre Johnson's motion to amend complaint (dkt. ##12, 13) is GRANTED.

2. Plaintiff is GRANTED leave to proceed on Eighth Amendment claim against defendants Grady and Uherka related to the strip search.

3. Plaintiff is denied leave to proceed on any other claim, and defendants Foster, DeBlanc, Moon, Schneider, and Doe are DISMISSED.

4. 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.

5. For the time being, plaintiff must send the defendant a copy of every paper or document they file 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 they have sent a copy to the defendant or to defendant's attorney.

6. Plaintiff should keep a copy of all documents for their own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. If plaintiff is transferred while this case is pending, it is his obligation to inform the court of their new address. If he fails to do this and defendant or the court are unable to locate them, his claim may be dismissed for failure to prosecute.

Entered this 25th day of March, 2021

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge