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

JOHN MILLER,

Plaintiff,

v.

DR. CHARLES LARSON, ET AL.,

Defendants.

OPINION & ORDER

Case No. 15-cv-580-wmc

Pro se plaintiff John Miller originally filed this civil action in state court, alleging that the defendants violated his Eighth Amendment rights when they tried to remove a ring from his finger and then failed to treat his hand for the resulting injury. 42 U.S.C. § 1983. After defendants removed the case to federal court, plaintiff filed a Motion to Amend (dkt. #14) and a Motion for Appointment of Counsel (dkt. #15). As plaintiff was incarcerated at the time he filed his complaint, he is subject to the Prison Litigation and Reform Act ("PLRA"), which requires the court to screen his complaint before this case may proceed. 28 U.S.C. § 1915A. After reviewing it, the court concludes that plaintiff may proceed with his excessive force claim, but his deliberate indifference claim will be dismissed. His motions to amend his complaint and for appointment of counsel will be denied at this time.

ALLEGATIONS OF FACT[1]

Miller is currently incarcerated at Fox Lake Correctional Institution ("FLCI"). Miller named nine FLCI employees and entities as defendants: Dr. Charles Larson; assistant nurses Susan McMurray, Angela Kast, Wendy Polensky and Jodi Mulder; Captain Mel Pulver; the FLCI Health Services Unit ("HSU"); the FLCI Security Department; and the Wisconsin Department of Corrections ("WDOC").

On August 2, 2012, Miller was directed to report to FLCI's administration building, where Captain Pulver explained that he would have to remove an allegedly stolen wedding band he was wearing. Apparently, Miller could not remove the ring at that time. He was then told to report to HSU. Once at HSU, Dr. Larson and nurses McMurray, Kast, Polensky and Mulder alleged all attempted to remove the ring by "twisting, turning, pulling, rubbing, lubricating, prying and tugging" the ring. After Miller told them that he was in pain, they stopped trying to remove it. He did not request or receive treatment for any injuries at that time.

On August 4, Miller noticed a boil and extreme swelling on his ring finger, and he was in severe pain. That same day, photographs of his finger were taken, although Miller reports being told that he could not have copies of the pictures for himself. Once seen at HSU, however, he did not request treatment or complain about the pain he was in at that time.

[1] In addressing any pro se litigant's complaint, the court reads the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the facts above as alleged in Miller's complaint.

Two days later, on August 6, McMurray saw Miller, drained his finger and told him to return to HSU the next day if his finger had become infected. Miller returned as instructed, at which time, it appears that Dr. Larson saw him again, palpated his finger, and drained additional fluid from his finger.

OPINION

I. Motion to Amend (dkt. #14) and Motion for Appointment of Counsel (dkt. #15)

Before screening, the court turns to the two pending motions: (1) a Motion to Amend (dkt. #14), in which plaintiff seeks to add the FLCI warden as a defendant and to include allegations of a strip search that took place in January of 2016; and (2) a Motion for Appointment of Counsel (dkt. #15). Both requests must be denied at this time. As to his motion to amend, plaintiff includes *no* allegations suggesting that the warden was in any way involved in the incident or plaintiff's follow-up care, knew about it or approved of it. *See Lanigan v. Village of East Hazel Crest, Ill.*, 110 F.3d 467, 477 (7th Cir. 1997) (supervisor may be liable if he knows about and approves of conduct). Nor is there any allegation that the incident or its alleged aftermath involved or was precipitated by deficient training or a flawed policy in any way implicating FLCI's Warden. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989) (supervisor may be held liable if he had control over deficient training or flawed policies). Since adding the warden as a defendant based on the allegations in plaintiff's proposed amended complaint would only result in his dismissal for lack of personal involvement, leave to do so is denied. *See*

Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996) (it is appropriate to deny leave to amend to add futile or meritless claims).

As to the strip search allegations, this incident took place several years after the 2012 ring removal attempt, and plaintiff does not allege that any of the defendants that were part of that incident were also part of the 2016 strip search. Unless there is a connection between the strip search and the ring incident, Rule 20 of the Federal Rules of Civil Procedure would prohibit these claims from proceeding in the same lawsuit. *See* Fed. R. Civ. P. 20 (permitting a plaintiff to join multiple defendants in a lawsuit only if (1) at least one claim against each defendant arises out of the same transaction or series of transactions and (2) there is a question of law or fact common to all of the defendants); *George v. Smith,* 507 F.3d 605, 607 (7th Cir. 2007) (stating that a "buckshot complaint" raising unrelated claims against unrelated defendants "should be rejected" by the district court). Plaintiff says, however, that he has "reason to believe" that "Sgt. Krombos" caused the strip search for the purpose of retaliating and harassing plaintiff because of this lawsuit about the ring incident.

As an initial matter, this court is generally reluctant to allow prisoners to supplement or amend their complaints to include new claims that they have been retaliated against for filing the underlying lawsuit. These types of retaliation claims risk delaying resolution of the case indefinitely while the parties litigate and conduct discovery on each discrete instance of retaliation that may occur while the lawsuit progresses. *Fitzgerald v. Greer*, No. 07-cv-61, 2007 WL 5490138, at *1 (W.D. Wis. Apr. 2, 2007)("[A]llowing ongoing claims of retaliation to be added to a lawsuit as the lawsuit

progresses could result in a lawsuit's life being extended indefinitely."); *Upthegrove v. Kuka*, No. 05-cv-153, 2005 WL 2781747, at *2 (W.D. Wis. Oct. 21, 2005) (noting that court would deny leave to add retaliation claims to "avoid complication of issues which can result from an accumulation of claims in one action"). This is not to say that amending or supplementing a complaint to bring retaliation claims is always improper, but in most instances it is less confusing and more efficient to bring them in a separate lawsuit. This case is one of those instances, at least based on the limited allegations contained in plaintiff's proposed supplement.

To state a claim for retaliation, plaintiff would need to allege: (1) that he was engaged in a constitutionally protected activity; (2) that defendant took retaliatory actions that would deter a person of "ordinary firmness" from engaging in the protected activity in the future; and (3) sufficient facts that would make it plausible to infer that 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). Here, plaintiff's allegations that he filed a lawsuit and was subjected to a strip search are sufficient to satisfy the first and second prongs of his retaliation claim, but plaintiff has alleged no facts to support a causal connection between his lawsuit and the strip search. Instead, he alleges only that he has "reason to believe" they are connected.

This is not enough. Plaintiff does not allege that Krombos knew about the lawsuit, that Krombos is connected to any of the defendants named in this lawsuit or that Krombos would have any other motivation to retaliate because of a lawsuit filed against other prison officials. Without such allegations, plaintiff has not pleaded the

elements of a retaliation claim. Instead, plaintiff has merely pleaded that he suffered an unlawful strip search months after he filed this lawsuit. Such a claim belongs in a separate lawsuit and thus, plaintiff's motion to amend his complaint will be denied. If plaintiff believes he can properly plead all of the elements of a retaliation claim that is sufficiently connected to the present lawsuit, he may file a second proposed amended complaint that does so. The court will then reevaluate plaintiff's retaliation claim to determine whether it may proceed in this case.

As to plaintiff's motion for recruitment of counsel, he represents that his incarceration limits his ability to litigate the issues in this case, which will require significant research and investigation. As a preliminary matter, it appears plaintiff has made reasonable efforts to find a lawyer on his own, albeit ultimately unsuccessful.[2] *Jackson v. County of McLean*, 953 F.2d 1070 (7th Cir. 1992). Nevertheless, plaintiff has *not* shown that appointment of counsel is necessary in this case. Ideally, every deserving litigant would be represented by counsel. Unfortunately, the *pro se* litigants who file lawsuits in this district continue to vastly outnumber the lawyers willing and able to provide representation. For this reason, assistance in recruiting counsel is appropriate only when the plaintiff demonstrates that his or her is one of those relatively few in which it appears from the record that the legal and factual difficulty of the case

[2] Ordinarily, to prove that he has made reasonable efforts to find a lawyer, a plaintiff must submit letters from at least three lawyers, who he asked to represent him and who turned him down. Here, plaintiff lists the names of three different attorneys that have rejected his requests for representation. For practical reasons, including the other rulings below and recognition of the difficulty in obtaining a formal rejection letter, the court will deem this showing sufficient.

exceeds their ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007).

So far, plaintiff has shown himself capable of setting forth the relevant facts in sufficiently legible and readable fashion for the court to evaluate whether his allegations state a claim that entitles him to relief. Accordingly, the court will not grant plaintiff's request for assistance in recruiting counsel at this time.

II. Merits Review

Plaintiff alleges that the defendants violated his rights under the United States Constitution, the Wisconsin Constitution and Wisconsin state law. Although plaintiff references the First, Fourth, Fifth, Eighth, Ninth and Tenth Amendments of the U.S. Constitution, reading his allegations generously, his claims implicate only the Eighth Amendment's prohibitions on excessive force and deliberate indifference to serious medical needs.

Before addressing the merits of those two claims, three defendants will be dismissed at the outset -- the FLCI HSU and security department, as well as the WDOC. Because the HSU and security are both mere departments within FLCI, which itself falls under the umbrella of the WDOC, a state agency, none are subject to suit under § 1983. *See Ryan v. Illinois Dep't of Children & Family Servs.*, 185 F.3d 751, 758 (7th Cir. 1999) ("neither a state nor a state agency . . . is a 'person' for purposes of § 1983") (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)). This then leaves the proposed claims asserted against the six individual defendants addressed below.

A. Excessive Force

"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) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). If force is more than *de minimis*, then the court must consider "whether it 'was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Id.* (quoting *Hudson v. McMillian,* 503 U.S. 1, 7 (1992)). The factors relevant to deciding whether an officer used excessive force include: the need for the application of force; the relationship between the need and the amount of force that was used; the extent of the injury inflicted; the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and any efforts made to temper the severity of a forceful response. *Whitley*, 475 U.S. at 321.

Plaintiff's excessive force allegations all concern proposed defendants Larson, McMurray, Kast, Polensky and Mulder's collective attempts to take the allegedly stolen ring off his finger. Although it is a very close call, the court will allow plaintiff to proceed with an excessive force claim at this time. On the one hand, plaintiff alleges that defendants gave up attempting to remove his ring when he informed them that the attempts had become painful. On the other hand, he also alleges that defendants used so much force that he suffered pain and ultimately had an infected finger, which might permit an inference, at least at the pleading stage, that the use of force was indeed significant and greater than necessary under the circumstances. Based on these allegations, therefore, the court will allow plaintiff leave to proceed. However, plaintiff

should be aware that to ultimately prove his claim, he will need evidence that defendants were acting "maliciously and sadistically," with the purpose of causing him, and not in a good faith effort to restore discipline. It would seem unlikely that he can meet this burden.

B. Deliberate Indifference

A prison official violates the Eighth Amendment by being "deliberately indifferent" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (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). "Deliberate indifference" means awareness that the prisoner has a serious need for medical treatment and consciously fails to take reasonable measures to provide it. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). Allegations of delayed care, even a delay of just a few days, may violate the Eighth Amendment if the delay caused the inmate's condition to worsen or unnecessarily prolonged his pain. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010) ("[T]he length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment.") (citations omitted); *Smith v. Knox County Jail*, 666 F.3d 1037, 1039-40 (7th Cir. 2012); *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011). Thus, a plaintiff must prove three things: (1) plaintiff's need for medical treatment; (2) defendant's knowledge that plaintiff needed treatment; and (3) defendant consciously failed to take reasonable measures to provide the necessary treatment.

Plaintiff's allegations of deliberate indifference here involve Dr. McMurray. Granting him significant leeway for purposes of screening, the court will assume that plaintiff's allegations about his finger swelling create an inference that he had a serious medical need. Although plaintiff claims that proposed defendant McMurray acted with deliberate indifference to this medical need, his allegations again suggest the opposite. Indeed, while plaintiff alleges that he noticed his finger swelling on August 4, and that his finger was photographed that day, he acknowledges not asking for treatment at that time, nor does he even allege that he told anyone about the pain he was experiencing.

Moreover, Dr. McMurray provided treatment two days later, on August 6th, draining plaintiff's finger and instructing that he return to HSU the next day. When plaintiff returned as directed, his finger was palpated and drained. Plaintiff does not allege that his injuries continued beyond those few days, nor that the treatment provided was somehow unreasonable. To the contrary, the response by Dr. McMurray and other HSU staff appears appropriate and does not suggest that any defendant knew plaintiff needed treatment, much less delayed or refused to provide treatment. Accordingly, plaintiff may not proceed on an Eighth Amendment deliberate indifference claim against any defendant.

ORDER

IT IS ORDERED that:

1. Plaintiff John Miller's Motion to Amend (dkt. #14) and Motion for Appointment of Counsel (dkt. #15) are DENIED.

2. Plaintiff is GRANTED leave to proceed with his excessive force claims against defendants Larson, McMurray, Kast, Polensky and Mulder. Plaintiff is DENIED leave to proceed on all other claims.

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 defendants. Under the agreement, the Department of Justice will have 40 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 defendants.

4. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendants. 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 defendants or to defendants' 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 defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 26th day of September, 2016.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge