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

MICHAEL J. JONES,

Plaintiff,

v.

SERGEANT ROYZ, OFFICER WILSON, and OFFICER SWENSEN,[2]

Defendants.

OPINION & ORDER

14-cv-109-jdp[1]

Plaintiff Michael J. Jones, a prisoner incarcerated at the Columbia Correctional Institution, has submitted a proposed civil action under 42 U.S.C. § 1983, alleging that correctional officers harassed him and exposed him to danger at the hands of other inmates. In an April 17, 2014 order, the court dismissed plaintiff's complaint for failing to satisfy the pleading requirements of Federal Rule of Civil Procedure 8, but gave plaintiff a chance to submit an amended complaint more fully explaining his claims against each of the named defendants. Dkt. 12.

Plaintiff has responded by filing a series of documents: (1) a proposed amended complaint missing a signature page, Dkt. 13; (2) a signature page for the amended complaint, Dkt. 16; (3) a virtually identical version of his amended complaint missing the caption page, Dkt. 19; and (4) a motion for appointment of counsel, Dkt. 23. Because the two versions of

[1] This case was reassigned to me pursuant to a May 19, 2014 administrative order. Dkt. 18.

[2] I have amended the caption to reflect (1) the caption of plaintiff's amended complaint, in which he has deleted original defendants Caudillo and Preston and inserted new defendants Officer Wilson and Sergeant Royz; Dkt. 13; and (2) a letter in which plaintiff provides a corrected spelling for defendant Officer Swensen's name, Dkt. 22.

plaintiff's amended complaint are virtually identical, I will consider Dkt. 13 and 16 as the operative pleading and disregard Dkt. 19.

The next step is for the court to screen plaintiff's amended complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 & 1915A. 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). After review of the complaint with this principle in mind, I conclude that plaintiff adequately states retaliation and equal protection claims against defendant Officer Swenson, but I will deny him leave to proceed on the remainder of his claims. Also, I will deny plaintiff's motion for appointment of counsel without prejudice to his refiling it at a later date.

SCREENING THE COMPLAINT

1. Allegations of Fact

The following facts are drawn from the amended complaint. Plaintiff Michael J. Jones is an inmate at the Columbia Correctional Institution. Defendants Wilson and Swensen are correctional officers and defendant Royz is a sergeant at the prison.

Starting on June 19, 2013, defendants harassed plaintiff in the showers, repeatedly saying that he had a small penis and laughing at him. Plaintiff was humiliated by this treatment. He was treated worse than all other inmates, particularly the white inmates.

After plaintiff filed a grievance and said that he would sue the prison, inmates and staff "stuck together against [him]." Defendant Swensen said, "You'll pay for telling on me." Other inmates threatened plaintiff, saying "you[r'e] getting your ass kicked for suing."

Plaintiff believes that he was singled out because of his race and gender.

2. Analysis

Plaintiff alleges that he was harassed by defendants and when he complained about it, he was threatened and placed in danger. As the court stated in its April 17, 2014 order, verbal harassment alone is usually insufficient to support an Eighth Amendment claim. *See, e.g.*, *Dewalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) "[S]imple verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a protected liberty interest or deny a prisoner equal protection of the laws."); *Dobbey v. Illinois Department of Corrections*, 574 F.3d 443, 446 (7th Cir. 2009) ("[H]arassment, while regrettable, is not what comes to mind when one thinks of 'cruel and unusual' punishment."). Thus, I conclude that plaintiff fails to state a claim upon which relief may be granted with regard to defendants' harassment.

However, plaintiff has now clarified his allegations about defendants' retaliation after he complained about the harassment. He alleges that defendant Swensen said, "You'll pay for telling on me" and I understand him to be saying that inmates followed by threatening to harm him. Construing plaintiff's allegations that inmates and staff "stuck together against [him]" generously, I can infer that plaintiff is saying that Officer Swensen retaliated by either encouraging inmates to threaten plaintiff or failing to stop them from doing so.

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). I conclude that plaintiff has stated a First

Amendment claim against defendant Swensen. A prisoner's right to file a grievance or lawsuit has been recognized as a constitutionally protected activity. *Hopkins v. Linear*, 395 F.3d372, 375 (7th Cir. 2005); *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002). Further, it is likely that receiving threats of harm would deter a person of ordinary firmness from filing grievances or lawsuit in the future, and plaintiff alleges that Swensen threatened plaintiff because of his complaints.

Finally, I understand plaintiff to be alleging that defendants' action violated his rights under the Equal Protection Clause. As mentioned above, defendants' verbal harassment does not violate the Constitution under either an Eighth Amendment or equal protection theory, so he may not proceed on a claim regarding the harassment. *See Dewalt*, 224 F.3d at 612. Although plaintiff's allegations of race and gender discrimination with regard to defendant Swensen's retaliatory actions are extremely thin, in this circuit, a plaintiff may state a claim for discrimination if he "identifies the type of discrimination that []he thinks occur[red] . . ., by whom . . . and when." *Swanson v. Citibank, NA*, 614 F.3d 400, 405 (7th Cir. 2010). Because plaintiff has satisfied those bare requirements, I will allow him to proceed on his claim under the equal protection clause. However, plaintiff should be aware that it will be much more difficult to prove his equal protection claim at summary judgment or trial. Going forward, plaintiff will have to provide evidence showing why he believes that he was discriminated against on the basis of his race and gender.

Because plaintiff fails to state any claims upon which relief may be granted regarding defendants Wilson and Royz, I will dismiss them from the case.

RECRUITMENT OF COUNSEL

Plaintiff has filed a motion for appointment of counsel, Dkt. 23. The term "appoint" is a misnomer, as I do not have the authority to appoint counsel to represent a pro se plaintiff in this type of a case; I can only recruit counsel who may be willing to serve in that capacity. To show that it is appropriate for the court to recruit counsel, plaintiff must first show that he has made reasonable efforts to locate an attorney on his own. *See Jackson v. Cnty. of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) ("the district judge must first determine if the indigent has made reasonable efforts to retain counsel and was unsuccessful or that the indigent was effectively precluded from making such efforts"). Plaintiff states that he has written to several local attorneys but has had "no luck." The court would usually require plaintiff to submit proof that these attorneys had turned him down, but it is unnecessary to do so here because plaintiff fails the second part of this court's test.

This court will seek to recruit counsel for a pro se litigant only when the litigant demonstrates that his case is one of those relatively few in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654–55 (7th Cir. 2007). It is too early to tell whether plaintiff's retaliation and equal protection claims will outstrip his litigation abilities. In particular, the case has not even passed the relatively early stage in which defendant may file a motion for summary judgment based on exhaustion of administrative remedies, which often ends up in dismissal of cases such as plaintiff's before they advance deep into the discovery stage of the litigation. Should the case pass the exhaustion stage and plaintiff believes that he is unable to litigate the suit himself, he may renew his motion.

ORDER

IT IS ORDERED that:

1. The caption is amended to reflect the caption of plaintiff's amended complaint, Dkt. 13 and 16. Defendants Caudillo and Preston are DISMISSED from the case.

2. Plaintiff is GRANTED leave to proceed on a First Amendment retaliation claim and an equal protection claim against defendant Officer Swensen.

3. Plaintiff is DENIED leave to proceed on the remainder of his claims, and defendants Wilson and Royz are DISMISSED from the case.

4. Plaintiff's motion for the court's assistance in recruiting him counsel, Dkt. 23, is DENIED without prejudice.

5. Under 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 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 on behalf of defendant.

6. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve defendant's lawyer directly rather than defendant himself. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

7. 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.

8. Plaintiff is obligated to pay the unpaid balance of the filing fee for this case in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under *Lucien v. DeTella*, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered March 11, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge