UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JAVIER SANTIAGO	:	
	:	PRISONER
v.	:	Case No. 3:04CV495 (SRU)
	:	
DEPARTMENT OF CORRECTION	:	
C/O O'CONNOR and	:	
CAPTAIN TIMOTHY BURKE	:	

RULING AND ORDER

Javier Santiago, an inmate currently confined at the Osborn Correctional Institution in Somers, Connecticut, brings this civil rights action pro se and in forma pauperis pursuant to 28 U.S.C. § 1915. He alleges that defendant O'Connor made sexually suggestive gestures toward him and verbally harassed him and that defendant Burke did not take Santiago's concerns seriously. For the reasons that follow, the complaint is dismissed without prejudice.

I. Standard of Review

Santiago has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed in forma pauperis in this action. Pursuant to 28 U.S.C. § 1915(e)(2)(B), "the court shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i) - (iii). Thus, the dismissal of a complaint by a district court under any of the three enumerated sections in 28 U.S.C. § 1915(e)(2)(B) is mandatory rather than discretionary. See Cruz v. Gomez, 202 F.3d 593, 596 (2d Cir. 2000).

"When an in forma pauperis plaintiff raises a cognizable claim, his complaint may not be dismissed sua sponte for frivolousness under § 1915(e)(2)(B)(i) even if the complaint fails to 'flesh out all the required details.'" Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (quoting Benitez, 907 F.2d at 1295).

> An action is "frivolous" when either: (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.'" Nance v. Kelly, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (quoting Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989)). A claim is based on an "indisputably meritless legal theory" when either the claim lacks an arguable basis in law, Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam), or a dispositive defense clearly exists on the face of the complaint. See Pino v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995).

Livingston, 141 F.3d at 437. The court exercises caution in dismissing a case under section 1915(e) because a claim that the court perceives as likely to be unsuccessful is not necessarily frivolous. See Neitzke v. Williams, 490 U.S. 319, 329 (1989).

A district court must also dismiss a complaint if it fails to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii) ("court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a claim upon which relief may be granted"); Gomez, 202 F.3d at 596 ("Prison Litigation Reform Act . . . which redesignated § 1915(d) as § 1915(e) [] provided that dismissal for failure to state a claim is mandatory"). In reviewing the complaint, the court "accept[s] as true all factual allegations in the complaint" and draws inferences from these allegations in the light most favorable to the plaintiff. Gomez, 202 F.3d at 596 (citing King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999)). Dismissal of the complaint under 28 U.S.C. §

1915(e)(2)(B)(ii), is only appropriate if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 597 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

In addition, "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," the court should permit "a pro se plaintiff who is proceeding in forma pauperis" to file an amended complaint that states a claim upon which relief may be granted. Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

In order to state a claim for relief under section 1983 of the Civil Rights Act, Santiago must satisfy a two-part test. First, he must allege facts demonstrating that the defendants acted under color of state law. Second, he must allege facts demonstrating that he has been deprived of a constitutionally or federally protected right. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982); Washington v. James, 782 F.2d 1134, 1138 (2d Cir. 1986).

II. Facts

The facts are taken from the statement of harassment excerpted from proceedings before the Connecticut Commission on Human Rights and Opportunities, appended to the complaint. For purposes of reviewing the complaint, the court presumes Santiago's allegations are true.

The events giving rise to this action occurred during the period from May 20, 2003 through May 28, 2003, while Santiago was confined at the Walker Reception Center and Special Management Unit in Suffield, Connecticut. Defendant O'Connor told Santiago that he would ensure that Santiago performed his job "until the point of hating [O'Connor]." On another occasion, defendant O'Connor threw four or five pieces of paper at Santiago, hitting Santiago in the back. Also, on May 25, 2003,

defendant O'Connor was making gestures with a broomstick near Santiago's backside. Defendant O'Connor did not touch Santiago personally or with the broomstick. Santiago stated to O'Connor that he was no homosexual.

On May 27, 2003, defendant O'Connor summoned Santiago for a work assignment. Santiago refused to go. Santiago told defendant O'Connor that he would not tolerate defendant O'Connor's behavior and that defendant O'Connor could fire Santiago from the job. Santiago was replaced in the job assignment and assigned to another cell. Defendant Burke spoke with Santiago, but did not take his concerns seriously. Defendant Burke "made fun of" Santiago's claims and did not investigate them.

III. Discussion

Santiago characterizes his claim as sexual harassment. The Second Circuit has held that the sexual abuse of an inmate by a correctional officer may reach constitutional dimension as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. See Boddie v. Schnieder, 105 F.3d 857, 859, 860-61 (2d Cir. 1997).

To state an Eighth Amendment claim, plaintiff must satisfy objective and subjective requirements. See id. at 861. Objectively, the defendant's actions or the resulting conditions of confinement must be sufficiently serious. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Subjectively, plaintiff must show that the defendant had a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834.

Despite acknowledging the viability of sexual abuse as an Eighth Amendment violation, the Second Circuit upheld the dismissal of the sexual harassment claims in Boddie. The court concluded

that

> [Boddie] asserts a small number of incidents in which he allegedly was verbally harassed, touched, and pressed against without his consent. No single incident that he described was severe enough to be "objectively, sufficiently serious." Nor were the incidents cumulatively egregious in the harm they inflicted. The isolated episodes of harassment and touching alleged by Boddie are despicable and, if true, they may potentially be the basis of state tort actions. But they do not involve a harm of federal constitutional proportions as defined by the Supreme Court.

Boddie, 105 F.3d at 861 (citations omitted).

In addition, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

Santiago alleges only that defendant O'Connor made gestures and, possibly, comments, and that defendant Burke made fun of his concerns. He does not allege any physical contact, sexual or otherwise, with any defendant. Courts considering claims of sexual harassment have found allegations sufficient to state a claim primarily when the inmate suffered some physical contact. When the prisoner failed to allege physical contact or injury, the courts have rejected the sexual harassment claims. See, e.g., Minifield v. Butikofer, 298 F. Supp. 2d 900 (N.D. Cal. 2004) (holding that allegations that prison officer unzipped his clothing and told the inmate to grab the officer's penis and walked away laughing when the inmate refused, and did the same thing two days later but brushed against the inmate's arm before walking away, and that another officer held a candy bar toward his genital area, flipping it up and down, and then responded "I don't kiss and tell" when the inmate asked if the conduct was directed at him, set forth claim of verbal harassment only and did not state a claim under section 1983);

Johnson v. Medford, 208 F. Supp. 2d 590, 592-93 (W.D.N.C.) (holding that prisoner's allegation that female guard peeped through window of his cell and made unspecified obscene gestures was insufficient to state claim for sexual harassment and failed to allege physical injury as required by section 1997e(e)), aff'd, 37 F. Appx. 622 (4th Cir. 2002); Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1271 (N.D. Fla. 2002) (holding allegations that prisoner was sexually assaulted for two hours, suffered cuts, bruises and abrasions, and was so physically ill that he vomited were sufficient to satisfy physical injury requirement of section 1997e(e) and state a claim for sexual assault).

Santiago claims, consisting of statements and gestures only, are insufficient to satisfy the physical injury requirement set forth in section 1997e(e). In addition, the alleged actions, although distasteful, do not rise to the level of "cruel and unusual under contemporary standards." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Thus, plaintiff's claim of sexual harassment is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) as failing to state a claim upon which relief may be granted.

IV. Conclusion

The complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). In light of this dismissal, Santiago's motion for appointment of counsel [**doc. #3**] is **DENIED**. Santiago may file an amended complaint if he can allege facts to overcome the deficiencies identified in this ruling. If no amended complaint has been filed by August 15, 2004, then the clerk shall close this file.

SO ORDERED this 13th day of July 2004, at Bridgeport, Connecticut.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge