UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

TERRELL F. LEDBETTER IV	:	
	:	PRISONER
v.	:	Case No. 3:03CV2121(JBA)
	:	
MICHAEL CARTER, et al.[1]	:	

RULING ON DEFENDANTS' MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL [DOCS. ## 17, 23]

Plaintiff Terrell F. Ledbetter IV ("Ledbetter") currently is confined at the Carl Robinson Correctional Institution in Enfield, Connecticut. He brings this civil rights action pro se, pursuant to 28 U.S.C. § 1915. Ledbetter alleges that the defendants sexually harassed him while he was confined at the Osborn and Corrigan-Radgowski Correctional Institutions. Pending is defendants' motion to dismiss. For the reasons that follow, defendants' motion is granted.

I. Factual Background

Ledbetter alleges that in September and October 2002, while he was confined at Osborn Correctional Institution, he noticed that defendants Diaz and Rios "were putting their vaginal scents

[1]The named defendants are Michael Carter, Captain Penn, Lieutenant Jenkins, Correctional Officer SummerRock, Counselor "H" E Pod Counselor-Gang Unit, Counselor Schena, Nurse Laureen, Nurse Andrea, Counselor Paquette, Ms. Smith School Teacher, Corrections Officer Josafina Diaz and Corrections Officer Carmen Rios.

and fluids" on his pillowcase and other items. Subsequently, Ledbetter was transferred to the Corrigan-Radgowski Correctional Institution. Ledbetter noticed that other defendants were putting their "scent and fluids" on various documents and medication packages.

On December 27, 2004, defendants filed a motion to dismiss this action on the ground that Ledbetter fails to state a cognizable claim for sexual harassment. In response to the court's notice informing him of his obligation to respond to the motion, Ledbetter sought an extension of time to respond until after counsel was appointed. On March 24, 2005, the court denied Ledbetter's motion for extension of time and ordered him to file his response within thirty days, i.e., on or before April 24, 2005. Although Ledbetter's third motion for appointment of counsel had been returned to him because he failed to attach a certificate of service, the court also explained that there was no constitutional right to appointed counsel in civil cases and noted that, based on the current record, appointment of counsel would not be warranted.

Ledbetter has now refiled his motion for appointment of counsel. His response to the motion to dismiss, dated April 15, 2005, was received by the court on May 4, 2005.

II. Standard of Review

When considering a Rule 12(b) motion to dismiss, the court

accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Flores v. Southern Peru Copper Corp., 343 F.3d 140, 143 (2d Cir. 2003). Dismissal is inappropriate unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim entitling him to relief. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654 (1999); Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000). "'[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" York v. Association of Bar of City of New York, 286 F.3d 122, 125 (2d Cir.) (quoting Scheuer, 416 U.S. at 236), cert. denied, 537 U.S. 1089 (2002). In other words, "'the office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York, 375 F.3d 168, 176 (2d Cir. 2004) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). However, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss" from being granted. Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002) (internal quotation marks and citation omitted).

III. Discussion

The court discussed the merits of Ledbetter's request for appointment of counsel in the March 24, 2005 ruling. The record in this case has not changed since that date. In addition, Ledbetter has attached to his motion letters from Inmates' Legal Assistance Program explaining that the complaint fails to state a cognizable claim because Ledbetter has not suffered a physical injury. Accordingly, Ledbetter's motion for appointment of counsel is denied for the reasons stated in the March 24, 2005 ruling.

Defendants move to dismiss this case on two grounds. First, they contend that Ledbetter fails to state a cognizable claim for sexual harassment. Second, they argue that because Ledbetter fails to allege that he suffered any physical injury, his claim for compensatory damages is precluded under 42 U.S.C. § 1997e(e). In response, Ledbetter states that the court should deny defendants' motion because the incidents caused him to suffer emotionally and correctional staff failed to properly investigate his claims.

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, Ledbetter must satisfy objective and subjective requirements. See id. at 861. Objectively, the defendants' 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, Ledbetter must show that defendants had a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834.

In Boddie, the inmate alleged that a female correctional officer had made a pass at him, squeezed his hand, touched his penis, called him a "sexy black devil," pressed her breasts against his chest and pressed her vagina against his penis. See 105 F.3d at 859-61. Despite acknowledging the viability of sexual abuse as an Eighth Amendment violation, the Second Circuit upheld the dismissal of the sexual harassment claims. 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).

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., Morales v. Mackalm, 278 F.3d 126, 132 (2d Cir. 2002) (holding that allegations that female correctional officer asked plaintiff to have sex with her and to masturbate in front of her and other female correctional officers did not state a claim for sexual harassment); Santiago v. O'Connor, No. 3:04cv495 (SRU), 2004 WL 1638236, at *3 (D. Conn. July 13, 2004) (holding that allegations that correctional officer made sexually suggestive gestures or comments did not state claim for sexual harassment) (citing cases); but see, e.g., 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 state a claim for sexual assault).

Ledbetter alleges only that defendants left their fluids and scents on various items. He does not allege any physical contact, sexual or otherwise, with any defendant. The Court concludes that Ledbetter's allegations are similar to the claims of verbal abuse or minimal touching, as in Boddie, that do not

rise to the level of "cruel and unusual under contemporary standards." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). While the Court finds the alleged actions distasteful, the actions do not rise to the level of sexual harassment or sexual assault claims cognizable under section 1983. That Ledbetter may have suffered emotionally from the incident does not alter this determination.

Although Ledbetter argues in opposition to the motion to dismiss that his allegations were not sufficiently investigated, he does not include in his complaint any claim based on improper investigation and does not include as defendants the persons he states were investigating this matter. Ledbetter cannot amend his complaint in his memorandum. See Natale v. Town of Darien, No. CIV. 3:97CV583 (AHN), 1998 WL 91073, at *4 n. 2 (D. Conn. Feb. 26, 1998) (holding plaintiff may not amend complaint in memorandum of law) (citing Daury v. Smith, 842 F.2d 9, 15-16 (1st Cir. 1988)); Hartford Fire Ins. Co. v. Federated Dep't Stores, Inc., 723 F. Supp. 976, 987 (S.D.N.Y. 1989) (same). Thus, the court does not consider any claim based on improper investigation.

Defendants' motion to dismiss is granted on the ground that Ledbetter has failed to state a claim for sexual harassment.

V. Conclusion

Ledbetter's motion for appointment of counsel [**doc. #23**] is **DENIED** for the reasons stated in the March 24, 2005 ruling. Defendants' motion to dismiss [**doc. #17**] is **GRANTED**. The Clerk is directed to enter judgment in favor of defendants and close this case.

SO ORDERED this 29th day of July, 2005, at New Haven, Connecticut.

/s/Janet Bond Arterton
Janet Bond Arterton
United States District Judge