

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>ANTHONY BERNARD WILLIAMS,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>CIVIL ACTION</b>
<b>v.</b>	)	
	)	<b>No. 03-3254-CM</b>
	)	
<b>(FNU) ANDERSON, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	
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**MEMORANDUM AND ORDER**

Plaintiff filed suit under 42 U.S.C. § 1983, alleging that defendant Deputy Daniel Anderson sexually harassed defendant while he was an inmate at Wyandotte County Detention Center (WCDC). This matter comes before the court on defendants’ Motion to Dismiss (Doc. 25).

**I. Factual Background**

Plaintiff was an inmate at WCDC during the time of the alleged incidents giving rise to his complaint. Defendant Anderson is a deputy with the Wyandotte County Sheriff’s Office. Defendant Leroy Green is Sheriff of Wyandotte County.

Plaintiff’s complaint makes the following allegations against defendants Anderson and Green:

- A. In May and June 2001, defendant Anderson made sexually degrading remarks to and about plaintiff and grabbed plaintiff’s buttocks from behind in a sexual manner while he was on a payphone.
- B. A day or so later, defendant Anderson came into plaintiff’s cell and exposed his

penis to plaintiff.

- C. Defendant Anderson took plaintiff's face sheet, which had plaintiff's photograph on it, and rubbed it on his groin area while standing in front of plaintiff and other inmates. Defendant Anderson told plaintiff to "suck his dick."
- D. Defendant Anderson entered and later exited plaintiff's cell and remarked to other inmates in the pod that plaintiff "just gave me a blowjob."
- E. Defendant Green was informed of the above incidents, but continued to allow similar incidents to happen.

## **II. Legal Standards**

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10<sup>th</sup> Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

The court recognizes that plaintiff appears pro se, and the court therefore construes plaintiff's complaint liberally and judges it against a less stringent standard than that used for pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). As the Tenth Circuit has concluded:

We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant.

*Hall v. Bellmon*, 935 F.2d 1106, 1110 (10<sup>th</sup> Cir. 1991) (footnote omitted).

### **III. Analysis**

Plaintiff brings suit against defendants in their official and individual capacities.

#### **A. Individual Capacity Suits**

Government officials are entitled to qualified immunity from individual liability for civil damages under § 1983 when their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity questions most often present legal questions that the court should resolve because the form of immunity shields government officials from having "to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The court must first determine whether plaintiffs have alleged a violation of a constitutional or federal statutory right. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10<sup>th</sup> Cir. 1998) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998)). Only where the complaint alleges a valid claim does the court examine whether the right was clearly established such that a reasonable official would understand that his actions violated that right. *Id.*

The law is clearly established if there is “Supreme Court or Tenth Circuit opinion on point” that has found “the law to be as the plaintiff maintains.” *Garramone v. Romo*, 94 F.3d 1446, 1451 (10<sup>th</sup> Cir. 1996).

The issue of whether to apply the Due Process Clause of the Fourteenth Amendment or the Eighth Amendment depends on whether plaintiff was a pretrial detainee or convicted prisoner at the time of the alleged sexual harassment. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Regardless of plaintiff’s status, however, the proper analysis for the court in determining whether defendants violated plaintiff’s constitutional rights proceeds according to the standards for Eighth Amendment cases brought under § 1983. *See Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10<sup>th</sup> Cir. 1999).

The Eighth Amendment requires that prison officials provide humane conditions of confinement by ensuring that inmates receive adequate food, clothing, shelter, and medical care, and by taking “reasonable measures to guarantee the safety of inmates.” *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). Inmates necessarily, therefore, have the right to be free from sexual abuse. *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10<sup>th</sup> Cir. 1998). But in order to hold prison officials liable for violating an inmate’s Eighth Amendment rights, two requirements must be met. First, the alleged deprivation must be objectively serious enough to establish a constitutional violation. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). The objective component of an Eighth Amendment claim is “contextual and responsive to contemporary standards of decency.” *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). Thus, “[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary

standards of decency always are violated.” *Id.* However, “[t]hat is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action.” *Id.* Instead, the alleged conduct must be of a “sort ‘repugnant to the conscience of mankind.’” *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1986)). Under the second requirement, plaintiff must show a subjective component under which the prison officials acted with a sufficiently culpable state of mind. That is, plaintiff satisfies the second prong by showing that the prison officials acted “‘maliciously and sadistically for the very purpose of causing harm.’” *Giron v. Corrections Corp. of Am.*, 191 F.3d 1281, 1290 (10<sup>th</sup> Cir. 1999) (quoting *Whitley*, 475 U.S. at 320-21).

In this case, plaintiff makes several allegations that defendant Anderson verbally harassed defendant, including (1) making sexually degrading remarks to and about him; (2) rubbing plaintiff’s face sheet on his groin area in front of plaintiff and other inmates and telling plaintiff to “suck his dick”; and (3) remarking to other inmates in the pod that defendant “just gave me a blowjob.”

However, as the Tenth Circuit has held, verbal sexual harassment does not necessarily constitute a violation of an inmate’s Eighth Amendment rights. *See Adkins v. Rodriguez*, 59 F.3d 1034, 1037-38 (10<sup>th</sup> Cir. 1995). In *Adkins*, a female inmate alleged that a jailer verbally sexually harassed her. The court held that “[w]hile she has described outrageous and unacceptable conduct,” it did not give rise to a constitutional violation because “in the context of Eighth Amendment precedent . . . we cannot infuse defendant’s words of sexual harassment with the sort of violence or threats of violence cognizable in the confinement cases the [Supreme] Court has addressed.” *Id.* at 1037. *See also Barney*, 143 F.3d at 1310 n.11 (“Although plaintiffs allege Mr. Pulsipher subjected them to severe verbal sexual harassment and intimidation, these acts of verbal harassment alone are not sufficient to state a claim under the Eighth Amendment.”).

Nevertheless, plaintiff's claims of verbal harassment may be actionable in combination with physical assaults. *Barney*, 143 F.3d at 1310 n.11. In *Smith v. Cochran*, 339 F.3d 1205, 1212 (10<sup>th</sup> Cir. 2003), the court held that an inmate's allegations of rape easily satisfy both the objective and subjective components of an Eighth Amendment claim. Accordingly, at issue in this case is whether plaintiff's allegations that defendant Anderson grabbed his buttocks from behind in a sexual manner and exposed his penis to plaintiff meet the standards for an Eighth Amendment claim.

In *Joseph v. United States Federal Bureau of Prisons*, 332 F.3d 901, 2000 WL 1532783, at \*1 (10<sup>th</sup> Cir. Oct. 16, 2000), an inmate alleged that a prison employee touched him several times in a suggestive manner and exposed her breasts to him. The Tenth Circuit held that the alleged instances were not "objectively, sufficiently serious" to demonstrate a constitutional violation. *Id.* at \*2 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)) (citing *Boddie v. Schnieder*, 105 F.3d 857, 860-61 (2d Cir. 1997))). In *Boddie* a male inmate alleged that a female jailer touched his penis and bumped her breasts into his chest, pinning him against the door. 105 F.3d at 860. Nevertheless, the court concluded that:

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.

*Id.* at 861 (quoting *Farmer*, 511 U.S. at 833-34).

Plaintiff's allegations regarding his treatment gravely concerns the court. If plaintiff's allegations are true, the court finds the incidents to be outrageous, unacceptable, and despicable. However, the court must also conclude, given the state of the law as spelled out in *Joseph* and *Boddie*, plaintiff has not alleged conduct by defendants that satisfies the objective component of an Eighth Amendment violation. Plaintiff's

allegations are potentially actionable under state law, but they do not rise to the level of a constitutional violation. Consequently, the court concludes that plaintiff has not met his burden to show that defendants' conduct violated the law. Therefore, because plaintiff has not met this burden, the court need not address the second issue of qualified immunity to determine whether the law was clearly established. *Gehl Group v. Koby*, 63 F.3d 1528, 1533 (10<sup>th</sup> Cir. 1995).

**B. Official Capacity Suits**

Plaintiff's suit against defendants Green and Anderson in their official capacities is an attempt to hold Wyandotte County liable for constitutional violations committed by its employees. However, because the court has determined that defendants did not violate plaintiff's constitutional rights, plaintiff's suit against defendants in their official capacities is dismissed. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1317-18 (10<sup>th</sup> Cir. 2002).

**IT IS THEREFORE ORDERED** defendants' Motion to Dismiss (Doc. 25) is granted.

Dated this 7th day of September 2004, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**