IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES LAMONT NORWOOD,

ORDER

Petitioner,

v. 07-C-624-C

CAPTAIN RADTKE, Correctional Officer as C.C.I.; CORRECTIONAL OFFICER GRAAK; DR. MIKE VANDENBROOK, Psychologist/Clinician; Psychologist ANDREA NELSON; CORRECTIONAL OFFICER HERBRAND; CORRECTIONAL OFFICER FABRY; C.O. MORRISON; SGT. MADAY; C.O. GRAY; JANEL NICKEL, Security Director; AMY MILLARD, Complaint Examiner; TOM GOZINSKE, Complaint Examiner; AMY SMITH, Office of Secretary at Dept. of Corrections; RICK RAEMISCH, Secretary at Dept. of Corr.; and GREG GRAMS, Warden at C.C.I.,

Respondents.

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Petitioner Charles Norwood is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. He has struck out under 28 U.S.C. § 1915(g), which means that he cannot obtain indigent status under § 1915 in any future suit he files during the period of his incarceration unless his complaint alleges facts from which an inference may be drawn that he is in imminent danger of serious physical injury. In this case, petitioner argues that

he should not be required to prepay the $350 fee for filing this action because his complaint qualifies for the exception to the three strikes bar. I agree, in part. Only a portion of petitioner's complaint qualifies for the exception, as explained below.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Charles Norwood is an inmate currently confined at the Columbia Correctional Institution in Portage, Wisconsin. He is "a well-known homosexual person."

Respondents Radtke, Graak, Herbrand, Fabry, Morrison, Maday and Gray are correctional officers at Columbia Correctional Institution.

Respondent Vandenbrook is a psychologist/clinician at Columbia Correctional Institution.

Respondent Nelson is a psychologist at Columbia Correctional Institution.

Respondent Nickel is the security director at Columbia Correctional Institution.

Respondent Millard is a complaint examiner at Columbia Correctional Institution.

Respondent Gozinske is a complaint examiner at Columbia Correctional Institution.

Respondent Smith is employed at the office of the Secretary of the Department of Corrections.

Respondent Raemisch is Secretary of the Department of Corrections.

Respondent Grams is the warden at Columbia Correctional Institution.

On August 2 or 3, 2007, petitioner was moved from the DS-1 segregation unit to the DS-2 segregation unit. Petitioner was assigned a new cell mate in DS-2 who did not like homosexuals. When his cell mate became aware of the new cell assignment "he was mad about the arrangement and became hostile and said, 'something has got to happen.'" Petitioner's cell mate's "facial expression[s] were mean and contorted" and petitioner feared for his safety because his cell mate outweighed him by at least 35 pounds.

Following the August 2 or 3 cell assignment, petitioner told respondents Herbrand, Fabry, Gray, Maday and Graak, "You all know I'm gay and we went through this in March. I need to be doubled with care . . . because I fear for my safety." When petitioner told respondent Morrison he needed to be moved, Morrison replied, "So what? I'm not moving you, the person you request to double with is already doubled." When petitioner informed respondent Graak of his situation, Graak responded, "We don't cell gays together, they may make hanky-panky." Petitioner also requested that he be moved to the cell next door, to which respondent Graak replied, "Well we're saving that cell next door for the weekend, you just have to deal with it."

Respondent Herbrand "was immediately aware" and told petitioner, "You had this problem last time, I will inform Capt. Radtke of it." Respondent Herbrand returned to inform petitioner that his request to be moved was denied and that he would "just have to

deal with it." Later, when petitioner saw respondent Herbrand again, petitioner asked Herbrand how he could help. Respondent Herbrand replied, "It's the Capt[ain's] decision, it's out of my hands."

Respondent Gray was aware of petitioner's situation and failed to act. Respondent Fabry attempted to alert Sergeant Maday of petitioner's request to be moved, but Maday also denied his request.

Petitioner's cell mate was moved soon after the assignment in early August. (The exact date of the cell assignment and the cell mate's movement to another cell are unknown. Petitioner alleges only that the cell assignment happened on August 2 or 3 and "a day or so later" his cell mate moved because of petitioner's sexual orientation.)

On August 5, petitioner sent a memorandum addressed to Unit DS-2 management/social worker in which he complained about having been assigned a cell mate who has "phobias for gay people." Petitioner stated,

> I requested my relative as a cell condition "pair with care." I was denied. I requested to be moved in the unoccupied cell next door. I was denied. The DS-2 staff literally told me, "I don't care. I'm not moving you. Deal with it." These same staff members said it. I request you intervene.

In a memorandum dated August 6, 2007, respondent Radtke responded to petitioner's letter as follows:

> I am in receipt of your request asking to be placed on a pair with care doubling status, and claiming you are being harassed by DS-2 staff. Doubling status is

> reviewed by both the Psychological Services and Security departments. I have discussed your doubling status with Psychological Services, and at this time you are eligible to be doubled. If you are having difficulties adjusting to your living arrangements please work with Psychological Services or other members of your unit team who may be able to help you with coping skills. I want to remind you that you are responsible for your own actions. The letter that you have submitted to me will not in any way relinquish you from your responsibilities to maintain appropriate behaviors when dealing with others.
>
> I have spoken with Officer Graack as well as DS-2 staff who inform me he gave you direction on your interactions with other inmates, which in no way constitutes harassment. Your behaviors will be expected to remain consistent with policies.

On August 8, 2007, petitioner wrote a letter to respondent Grams, complaining that he had been placed in threatening situations because staff refused to assign him a new cell mate. Petitioner asked Grams to allow him to double cell with his relative, Cory Vanderpool, and not to allow any inmate in his cell other than ones that he requested.

In a letter dated August 13, 2007, respondent Grams addressed petitioner's requests as follows:

> I have reviewed your correspondence received in this office August 9, 2007. I do not get involved in the cellmate assignment or location of inmates housed on DS2. Unit staff make these determinations. If you have issues with your cellmate assignment, you need to address this with unit staff and follow the chain of command by contacting Capt. Radtke for review and consideration.

On August 22, 2007, petitioner filed an offender complaint challenging respondents' failure to take immediate action to move him from the cell to which he had been assigned

on or around August 2, 2007. On August 28, 2007, respondent Millard recommended that petitioner's complaint be dismissed. Respondent Millard stated as the reason for her recommendation, "ICE sees no reason to initiate any investigation into the allegations at this point as they would merely amount to a duplication of efforts already done." Marc Clements, the inmate complaint reviewer, dismissed petitioner's complaint in a decision entered September 4, 2007.

On September 6, 2007, petitioner filed a request for review of the dismissal of his August 22 offender complaint. Petitioner requested a reversal on the following grounds:

> I'm in imminent danger. I fear for my safety. On two occasions March 28th 2007 and August 3rd or 2nd 2007 I've been placed in cells with inmates [who] don't like gay males and they allways [sic] become hostile and threatening toward me. I've reported to many staff about being placed in rooms and subject to harm by placing a gay person and a straight person in a room together. The Columbia Correctional Institution (CCI) has disregarded that I have issues with problematic inmates who harass me and threaten me over my sexual orientation and they are failing to protect me.

On September 11, 2007, respondent Gozinske recommended to the Office of the Secretary that it dismiss petitioner's September 6 appeal. As his reason for dismissal, respondent Gozinske stated, "The institution complaint examiner's report reasonably and appropriately addressed the issue raised by this inmate. Thus, it is recommended this appeal be dismissed." Subsequently, petitioner's appeal was dismissed by respondent Amy Smith in the Office of the Secretary on September 12, 2007.

In the meantime, petitioner continued to request "pair with care" status in an interview request dated August 23, 2007. On August 28, 2007, respondent Nelson told petitioner, "Unfortunately, you do not meet the criteria for clinical PWC." Two days later, petitioner submitted another interview request asking for a memorandum explaining the criteria for "pair with care." Respondent Nelson responded on August 31, 2007, that "clinical doubling restrictions are determined on a case-by-case basis . . . and we do not believe you require a PWC for clinical reasons at this time."

Petitioner "is about to earn a step 3 increase," which means he will be eligible to go out into the day room area for an hour out of cuffs. According to petitioner,

> This Unit consists of 50 inmates. At least 8 to 10 of the alleged inmates soon may receive a step 3 level increase also. I was told by several not to come to the day room. At least 4 of at least 13 inmates I reported to the Capt. Radtke are on the tier with me as of 9-10-07. 6 of them are in DS-2 with me. The rest are either in population or other segs that always transfer here. At least 8 are in this institution. I was told they have friends (gang members) that could "put hands on me" or "reach out" as inmates like to say.

DISCUSSION

28 U.S.C. § 1915(g) states,

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical

injury.

On three or more prior occasions, petitioner Norwood has filed lawsuits in this court that were dismissed as legally frivolous of for failure to state a claim upon which relief may be granted. See Norwood v. Hamblin, 04-C-318-C, decided Nov. 24, 2004, Norwood v. Hamblin, 04-C-846-C, also decided Nov. 24, 2004; and Norwood v. Hamblin, 04-C-854-C, decided Dec. 2, 2004. Thus, he must prepay the filing fee for this lawsuit unless his complaint alleges that he is in imminent danger of serious physical injury.

Earlier this year, on August 8, 2007, petitioner filed another lawsuit in this court, Norwood v. Radtke, 07-C-446-C, which was nearly identical to the complaint in this case. In case no. 07-C-446-C, petitioner alleged that he was in imminent danger because on two separate occasions, in March 2007 and on August 2 or 3, 2007, he had been assigned to share a cell with an inmate who threatened him because of his sexual orientation. In an order dated August 22, 2007, I granted in part and denied in part petitioner's request for leave to proceed in forma pauperis. I told petitioner that he could not escape § 1915(g)'s bar to in forma pauperis litigation with respect to his claim that prison officials were deliberately indifferent to his health or safety in March 2007, because the threat of imminent danger had passed by the time he filed his complaint in this court. However, because petitioner's allegations concerning his August 2 or 3 cell assignment appeared to be ongoing at the time he filed his complaint on August 8, I ruled that petitioner was eligible to utilize the

imminent danger exception to 28 U.S.C. §1915(g) with regard to that claim. Nevertheless, I promptly dismissed the case on the court's own motion because it appeared certain that petitioner could not have fully exhausted his administrative remedies with respect to the claim in less than one week.

In this case, petitioner has attached to his complaint proof that he has now exhausted his administrative remedies with regard to the early August cell assignment. Unfortunately, the complaint reveals as well that "a day or so" after petitioner received the assignment, his cell mate was moved. As I told petitioner in case number 07-C-446-C, in order to meet the imminent danger requirement of 28 U.S.C. § 1915(g), a petitioner must allege a physical injury that is imminent or occurring at the time the complaint is filed and the threat or prison condition causing the physical injury must be real and proximate. Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (citing Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002) and Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)). Because the danger that petitioner faced with respect to the allegedly improper August cell assignment appears to have passed, petitioner cannot proceed under the in forma pauperis statute with respect to this claim. If he wants to pursue it, he will have to file a separate lawsuit and prepay the $350 filing fee.

However, petitioner does make additional allegations in this suit that pass muster under the exception to 1915(g). Petitioner alleges that certain respondents are refusing to

heed warning signs that he will be assaulted if he is denied "pair with care" status and that his health or safety will be endangered if he is awarded a step increase and forced to associate with threatening inmates in the day room. I am inclined to accept petitioner's characterization of his present circumstances as constituting a real and not an imagined threat to his safety. Therefore, petitioner need not prepay the $350 fee before submitting these claims to the court for consideration. It is appropriate for him to present the claims along with a request for leave to proceed in forma pauperis under 28 U.S.C. §§ 1915(a) and (b).

An examination of petitioner's trust fund account statement reveals that petitioner earns no income and has a zero balance in his prison account. That means he will not have to pay an initial partial payment. A prisoner who has no assets and no means to pay the initial partial filing fee may proceed under 28 U.S.C. § 1915(b)(4), which provides, "In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."

I turn then to the merits of petitioner's complaint. 28 U.S.C. § 1915(e)(2) provides that the court shall dismiss a 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. Petitioner's complaint is not

subject to dismissal under this section.

The failure of a prison official to protect an inmate from an assault by another inmate may violate the Eighth Amendment if the official acted with deliberate indifference to the prisoner's safety. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985); Matzker v. Herr, 748 F.2d 1142, 1149 (7th Cir. 1984). Deliberate indifference is evidenced by a prison official's actual intent or reckless disregard for a prisoner's health or safety, and must amount to highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Id. In other words, to succeed on his claim ultimately, petitioner will have to prove that each respondent was both aware of facts from which an inference could be drawn that he faces a substantial risk of serious harm and that he drew the inference. Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

Petitioner alleges that respondent Radtke was aware that petitioner feared for his safety if he were not given "pair with care" housing arrangements and that Radtke nevertheless refused to grant the status. He alleges that he told respondent Grams about his concerns and that Gram's response was to tell petitioner that he does not get involved in housing assignments. Petitioner utilized the inmate grievance system to explain his situation and obtain relief and respondents Millard, Gozinske and Smith recommended or accepted a recommendation to dismiss petitioner's complaints and appeals. Petitioner asked

respondent Nelson to enter him into the "pair with care" program and Nelson denied the request. Liberally construing these allegations, I am satisfied that petitioner states a claim of deliberate indifference to his safety in his cell assignments on the parts of respondents Radtke, Grams, Millard, Gozinske, Smith and Nelson.

With respect to petitioner's concerns about entering level 3 and gaining access to the day room where other inmates intend to harm him, it requires a generous reading of the allegations of the complaint to infer that respondent Radtke or anyone else is acting with deliberate indifference to his safety. Even petitioner seems unsure about who will pose a threat to his safety. Nevertheless, it seems reasonable to allow petitioner to address together in this lawsuit his claims that because he is a well-known homosexual, he is exposed to the threat of serious physical injury both in his cell assignments and his housing unit assignments. Therefore, I will allow him to proceed on this claim against respondent Radtke.

Respondents Graak, Vandenbrook, Herbrand, Fabry, Morrison, Maday, Gray, Nickel and Raemisch are alleged to have been responsible for refusing to take action to protect petitioner with respect to his early August cell assignment. Because this claim is not a part of this action, these respondents will be dismissed.

ORDER

IT IS ORDERED that

- Petitioner's request for permission to apply for in forma pauperis status is

1) DENIED with respect to his claim that respondents were deliberately indifferent to his safety by refusing to move him from his August 2007 cell assignment. Petitioner is free to raise this claim in a separate lawsuit if he prepays the $350 filing fee; and

2) GRANTED with respect to his claims that his present and near future cell and housing assignments are exposing him to imminent danger of serious physical injury.

- Petitioner is GRANTED leave to proceed in forma pauperis on his claims that

1) respondents Radtke, Grams, Millard, Gozinske, Smith and Nelson are being deliberately indifferent to his safety in his cell assignments; and

2) respondent Radtke is being deliberately indifferent to his safety in his housing assignment.

- Respondents Graak, Vandenbrook, Herbrand, Fabry, Morrison, Maday, Gray, Nickel and Raemisch are DISMISSED from this case.
- For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

- Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- The unpaid balance of petitioner's filing fee is $350; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2). In a separate letter, I am notifying the warden of the Columbia Correctional Institution that as soon as funds exist in petitioner's account, he must begin paying the fee in monthly installments as required under 28 U.S.C. § 1915(b)(2). Furthermore, the clerk of court is requested to insure that the court's financial records reflect petitioner's obligation to pay the filing fee in this case.
- Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the

Attorney General for service on the state defendants.

Entered this 16th day of November, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge