IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS SHELLEY,

ORDER

Petitioner,

09-cv-69-bbc

v.

RANDALL HEPP,
TAMMY MAASSEN
and DR. REYNOLDS, BRET,

Respondents.

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On January 30, 2009, I dismissed petitioner Thomas Shelley's proposed 42 U.S.C. § 1983 complaint in case no. 09-cv-30-bbc against respondent Reynolds alleging that he was denied adequate medical care because he failed to exhaust his administrative remedies. 42 U.S.C. § 1997e(a). Now petitioner has brought a new proposed civil complaint in case no. 09-cv-69-bbc, against respondents Dr. Bret Reynolds, Randall Hepp and Tammy Maassen, in which he claims that he has exhausted his administrative remedies. In his complaint he alleges that respondents forced him to walk outside through extremely cold weather without proper cold-weather attire and are currently denying him adequate medical care under the Eighth Amendment by discontinuing his prescribed medications. Also, he brings a claim for

negligent infliction of emotional distress under Wisconsin law. In addition, petitioner has filed several other documents: (1) an affidavit that I construe as an attachment to his complaint; (2) a motion to compel the production of his medical file; (3) a motion to withdraw his motion to compel; and (4) a motion for preliminary injunctive relief. Finally, petitioner requests leave to proceed in forma pauperis in this case. However, he has struck out under 28 U.S.C. § 1915(g), which means that he cannot obtain indigent status under § 1915 in this or any other civil 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.

After applying 28 U.S.C. § 1915(g) to petitioner's claims, I conclude that only one of his claims could be construed as an allegation of imminent danger of serious physical injury. Therefore, I will give him a chance to choose whether (1) to proceed with his imminent danger claim regarding denial of medical care, at which point that claim will be screened but his other claims will be dismissed without prejudice; or (2) pay the $350 filing fee and have the court screen all of his claims. Also, I will grant his motion to withdraw (dkt. #3) his motion to compel the production of his medical file.

In his complaint and its attachment, petitioner alleges the following facts:

ALLEGATIONS OF FACT

Petitioner Thomas Shelley is a prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin. The respondents are all employed at the Jackson Correctional Institution; Randell Hepp is the warden, Tammy Maassen is the Health Services Unit Manager and Bret Reynolds is a psychiatrist. At some point in the past, petitioner was diagnosed by a Dr. Ticho and a Dr. Eggener with Attention Deficit Hyperactivity Disorder, Attention Deficit Disorder, "Acute Reaction" and Post-Traumatic Stress Disorder.

From at least 2005 to December 2008, petitioner was prescribed Adderall and Seroquel by several doctors, including those treating him while he was incarcerated in various Wisconsin prisons during this time period. Over this time, his doctors increased his dosages of these medications numerous times. His dosages were last increased by a Dr. Decrest at the Dodge Correctional Institution. In particular, Decrest increased his Seroquel prescription from one 100 milligram dosage at bed to one 50 milligram dosage at dinner and another 250 milligram dosage at bed.

Petitioner arrived at the Jackson Correctional Institution on December 23, 2008. In order to receive his medications at the Jackson Correctional Institution, petitioner had to walk at least one quarter of a mile, four times daily, even when the temperature was "sub-zero," without proper clothing, gloves or long underwear. He heard rumors that when he first met with respondent Reynolds, his medications would be discontinued immediately. Petitioner filled out a refill request for his medications on January 5, 2009 and first met with

Reynolds on January 6, 2009. This meeting lasted no longer than a minute and a half. Reynolds started by calling petitioner by the wrong name, "Mr. Smeller." Reynolds discontinued petitioner's medications "per Jackson's way, and [the medications were] addicting." Petitioner was not weaned off these medications, there was no follow-up meeting with Reynolds, and Reynolds did not prescribe other medications for his mental illnesses.

Petitioner sent numerous health service requests, psychological service requests, inmate requests and direct correspondence to respondents Hepp and Maassen, as well as anyone else he was told to write to.

Since having his medications discontinued, petitioner has experienced severe withdrawal symptoms, psychotic thoughts, voices, lack of concentration or focus, restlessness, racing thoughts "(head/mind feels like a person has the remote control to my brain and is changing channel every 30 seconds)," severe headaches, "fears of [his] impulsiveness of acting without thought—harming or hurting persons unintentionally," "physiological changes," fatigue, insomnia, hypersomnia, vivid unpleasant dreams when he does sleep, "dermtosis," "derealization" and irritability.

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 at least three or more prior occasions, petitioner has filed lawsuits or appeals that were dismissed as legally frivolous or because they failed to state a claim upon which relief may be granted. Shelley v. Bartels, 06-C-479-S (W.D. Wis. Sept. 19, 2006); Shelley v. Bailey, 07-C-231-S, (W.D. Wis. May 11, 2007); Shelley v. Hoenisch, 08-cv-107-bbc (W.D. Wis. Mar. 10, 2008). Thus, he must prepay the filing fee for this lawsuit unless his complaint alleges that he is in imminent danger of serious physical injury.

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 Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003); Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002)). In his complaint and attached affidavit, petitioner alleges that respondents (1) forced him to walk outside through extremely cold weather without proper cold weather attire in order to obtain his medications; (2) discontinued his medications for treatment of various mental illnesses, resulting in physical and mental pain; and (3)

negligently inflicted emotional distress.

Regarding petitioner's claim that respondent Reynolds discontinued his medications, I conclude he meets the imminent danger requirement of 28 U.S.C. § 1915(g). It is well-established that pro se complaints must be liberally construed. Ciarpaglini v. Saini, 352 F.3d at 330. Moreover, I must accept as true petitioner's claim that he is suffering severe headaches and "physiological changes" as a result of being denied his medications. Under Ciarpaglini, it is improper to adopt a "complicated set of rules [to discern] what conditions are serious enough" to constitute "serious physical injury" under § 1915(g). Id. at 331. Therefore, petitioner need not prepay the $350 fee before submitting this claim to the court for consideration. It is appropriate for him to present this claim along with a request for leave to proceed in forma pauperis under 28 U.S.C. §§ 1915, as he has done here.

However, petitioner's other claims do not meet the imminent danger requirement of 28 U.S.C. § 1915(g). First, he alleges that respondents forced him to walk outside through extremely cold weather without proper cold weather attire in order to obtain his medications. Yet he also alleges that respondent Reynolds discontinued his medications on January 6, 2009. Therefore, at the time of filing his complaint, petitioner no longer received medications and was not required to walk outside to obtain them. Thus he was not in imminent danger of serious physical injury at the time of filing the complaint. In any event, application of the imminent danger exception of § 1915(g) requires more than a conclusory

allegation that the petitioner lacks "proper clothing" to protect him from the cold. It must appear to the court that petitioner's attire is so grossly inadequate and the weather so repeatedly severe that he faces a risk of serious physical injury. Petitioner's allegations fall short of this mark. Second, by definition, petitioner's state-law negligent infliction of emotional distress claim concerns emotional harm rather than physical harm, and thus fails to allege he is in imminent danger of serious physical injury as a result of respondents' infliction of emotional distress.

It is this court's usual practice to move forward on imminent danger claims as quickly as possible by screening the complaint even before an initial partial payment has been made and, if the complaint survives screening, setting expedited briefing on preliminary injunctive relief. E.g., Norwood v. Strahota, 08-cv-446 (W.D. Wis. Aug. 11, 2008). On the other hand, in cases in which a petitioner with three strikes brings no claims that allege imminent danger, ordinarily this court gives the petitioner a short deadline within which he is to pay the full $350 filing fee or have the case closed. This case is unusual in that petitioner brings one claim that qualifies for the imminent danger exception and two claims that do not. It is impractical to proceed quickly on the imminent danger claim while waiting for payment of the filing fee in order to screen his other claims under 28 U.S.C. § 1915A. Therefore, I will give petitioner a choice: he can choose to (1) proceed with his imminent danger claim regarding denial of medical care, at which point I will screen that claim but dismiss his other

claims without prejudice; or he can choose to (2) pay the $350 filing fee and have the court screen all of his claims. He will have until March 11, 2009, to make the choice. Should he fail to respond by the deadline, I will assume that he wishes to proceed on his imminent danger claims and I will dismiss his other claims.

I note that petitioner's negligent infliction of emotional distress claim has another problem. This court will not exercise supplemental jurisdiction over a state law claim if it appears that a petitioner has failed to follow state procedures relevant to the claim. Wisconsin Statutes § 893.82(3) requires a claimant bringing a civil action against a state officer or employee to serve written notice of the claim on the Wisconsin Attorney General within 120 days of the events giving rise to the claim. The written notice must include the time, date and circumstances of the event causing the injury or damage for which the claimant seeks relief, as well as the names of the state officials involved. Id. When a petitioner has failed to comply with the notice of claim statute, this court lacks jurisdiction to hear his claim. Saldivar v. Cadena, 622 F. Supp. 949, 959 (W.D. Wis. 1985) (noting that Wis. Stat. § 893.82 "imposes a condition precedent to the right to maintain an action"). Petitioner has not averred that he gave timely notice to the Wisconsin Attorney General. Therefore it may be that this court lacks jurisdiction to hear petitioner's state-law negligent infliction of emotional distress claim. If petitioner chooses to pay the $350 filing fee in this case and have the court consider his negligent infliction of emotional distress claim, he will

have to provide proof that he has notified the Wisconsin Attorney General of his claim in accordance with Wis. Stat. § 893.82(3).

Finally, I will address petitioner's pending motions. Initially, petitioner filed a motion to compel the production of his medical file, but then filed a motion to withdraw the motion to compel because he has received the appropriate files. Therefore, I will grant his motion to withdraw his motion to compel. Also, petitioner has filed a motion for preliminary injunctive relief seeking restoration of his prescriptions, supported by 64 pages of exhibits. If in responding to this order he wishes to pursue his imminent danger claim, the court will screen the claim under 28 U.S.C. § 1915(e)(2), and should the claim survive screening, consider his motion for preliminary injunctive relief. However, it is clear that his evidentiary submissions do not comply with this court's procedures for obtaining a preliminary injunction because they do not include proposed findings of fact, so they must be disregarded. Any documents petitioner wishes to submit in support of his motion for injunctive relief must conform to this court's procedures, which I have attached to this order. Petitioner is encouraged to begin preparing these materials, so that in the event he is allowed to proceed in forma pauperis on his imminent danger claim, he will be able to submit these materials as quickly as possible.

ORDER

IT IS ORDERED that:

1. Petitioner may have until March 11, 2009, to advise the court whether he wishes to (1) proceed with his imminent danger claim regarding denial of medical care, at which point that claim will be screened but his other claims will be dismissed without prejudice; or (2) pay the $350 filing fee and have the court screen all of his claims. Should petitioner fail to respond to this order by March 11, 2009, I will assume that he wishes to proceed on his imminent danger claim and I will dismiss his other claims. If he decides he will pay the $350 filing fee, he may have until March 18, 2009, to submit a check or money order made payable to the clerk of court in the amount of $350.

2. Petitioner's motion to withdraw (dkt. #3) his motion to compel the production of his medical file is GRANTED. Petitioner's motion to compel (dkt. #2) the production of his medical file is considered withdrawn.

Entered this 25th day of February, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge