IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DWAYNE ALMOND,

Plaintiff,

v.

WILLIAM POLLARD, DR. R. MCQUEENEY, DR. RICHARD HEIDORN, R.N. JEANANNA ZWIERS, JOHN DOE DIRECTOR, JAMES E. DOYLE and RICK RAEMISCH,

Defendants.

OPINION and ORDER

10-cv-621-bbc

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Plaintiff Dwayne Almond, a prisoner at the Green Bay Correctional Institution, has filed an action under 42 U.S.C. § 1983 in which he alleges that he is being denied his medication for treatment of serious mental health problems. Plaintiff originally brought this action in case no. 10-cv-292-bbc, but I dismissed that case without prejudice because plaintiff's submissions made it clear that he did not exhaust his administrative remedies until after he filed his lawsuit. Plaintiff has agreed to refile this action under the present case number.

Plaintiff has struck out under 28 U.S.C. § 1915(g) because on three different occasions, he has filed lawsuits that were dismissed as dismissed as frivolous. This means

that he cannot obtain indigent status under § 1915 in any suit he files during the period of his incarceration unless he alleges facts in his complaint from which an inference may be drawn that he is in imminent danger of serious physical injury.

After considering plaintiff's allegations, I conclude that his claims meet the imminent danger standard. I will grant plaintiff leave to proceed on his claims against defendants John Doe psychiatric supervisor and Warden William Pollard, but deny him leave to proceed on his claims against the remaining defendants. Further, because plaintiff is alleging that he is in imminent danger of serious physical injury, I will construe his complaint as including a request for preliminary injunctive relief and give the parties an opportunity to brief the motion in accordance with this court's procedures.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Dwayne Almond is a prisoner at the Green Bay Correctional Institution. Plaintiff has paranoid-type schizophrenia. In the past, this illness has been treated with medication. On January 5, 2010, plaintiff met with defendant Dr. R. McQueeney, who is a psychiatrist. They discussed a medication called Lonozepam. McQueeney placed an order for this medication, but the order was denied by his supervisor, defendant John Doe, who supervises all DOC psychiatrists and psychologists. Plaintiff never received Lonozepam to treat his schizophrenia following the January 5, 2010 appointment. As a result, plaintiff hears voices, suffers chronic "distressful mental pains" and has eaten his own feces.

Defendants Dr. Richard Heidorn and nurse Jeananna Zwiers assist defendant McQueeney in passing out medications to prisoners and with "orders for mentally ill inmates." They were aware of plaintiff's mental health needs but did not intervene. Defendant William Pollard, warden of the Green Bay prison, conducts reviews of inmate grievances. He responded to plaintiff's complaint about his medication by saying that "he doesn't care" about plaintiff's condition.

Defendants James Doyle, the Wisconsin governor, and Rick Raemisch, Secretary of the Wisconsin Department of Corrections, permitted defendants' actions because they are "in control[]" of all Department of Corrections employees.

DISCUSSION

A. Imminent Danger

Because plaintiff has not submitted payment of the $350 filing fee for this case, I construe his complaint as including a motion for leave to proceed in forma pauperis under 28 U.S.C. § 1915. However, as stated above, plaintiff has struck out under 28 U.S.C. § 1915(g). This provision reads as follows:

> 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 prior occasions, plaintiff has brought actions that were dismissed because

they were frivolous, malicious or failed to state a claim upon which relief may be granted. Almond v. State of Wisconsin, 06-C-447-C, decided August 23, 2006; Almond v. State of Wisconsin, 06-C-448-C, decided August 23, 2006; and Almond v. State of Wisconsin, 06-C-449-C, decided August 24, 2006. In a November 2, 2010 opinion in Turley v. Gaetz, 09-3847, 2010 WL 4286368, the Court of Appeals for the Seventh Circuit held that "a strike is incurred under § 1915(g) when an inmate's case is dismissed *in its entirety* based on the grounds listed in § 1915(g)," rather than when only one claim out of several is dismissed under § 1915(g). Each of the cases listed above was dismissed in its entirety, so plaintiff has incurred three strikes. Therefore, he cannot proceed in this case unless I find that he has alleged that he is in imminent danger of serious physical injury.

To meet the imminent danger requirement of 28 U.S.C. § 1915(g), a prisoner must allege a physical injury that is imminent or occurring at the time the complaint is filed and show that the threat or prison condition causing the physical injury is 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)). Ordinarily, claims of physical injury arise in the context of lawsuits alleging Eighth Amendment violations. In his complaint, plaintiff alleges that he is being denied his medication for treatment of paranoid-type schizophrenia. He hears voices, suffers chronic "distressful mental pains" and has been driven to eat his own feces.

In considering whether plaintiff's complaint meets the imminent danger requirement of § 1915(g), a court must follow the well established proposition that pro se complaints

must be liberally construed. Ciarpaglini, 352 F.3d at 330. Further, 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.

Given this framework, I conclude that plaintiff's allegations qualify under the imminent danger standard. Although it is unclear whether some of plaintiff's *mental* health symptoms could qualify as serious *physical* injuries, his allegation that he is being driven to eat his own feces is enough for me to conclude that plaintiff's illness is putting his physical health in serious danger. Therefore, plaintiff may proceed without prepayment of the $350 filing fee.

B. Initial Partial Payment

In order to proceed in forma pauperis, plaintiff must demonstrate that he is indigent by submitting a trust fund account statement for the six-month period preceding the filing of his complaint. I will delay a decision on plaintiff's request to proceed in forma pauperis until plaintiff provides a copy of his trust fund account statement for the period of time between April 19, 2010 and October 19, 2010.

Usually, the court would wait for plaintiff to submit his trust fund account information before screening his complaint. However, this is not a normal case. It makes no sense to hold on one hand that plaintiff's complaint alleges facts from which an inference may be drawn that he faces a real and proximate threat of danger, but to rule on the other hand that the case cannot move forward. Norwood v. Strahota, 08-cv-446 (W.D. Wis. Aug.

11, 2008). Plaintiff's allegations mandate a swifter response from the court. After all, as the court of appeals has acknowledged, § 1915(g) is just "a simple statutory provision governing when a prisoner must pay the filing fee for his claim." Ciarpaglini, 352 F.3d at 331. Therefore, although I am requiring plaintiff to submit the required trust fund account information and pay any amount he is assessed subsequently, with the remainder due in monthly installments later, I will proceed to screen the merits of his case under § 1915(e)(2) now.

C. Screening Plaintiff's Claims

In screening plaintiff's claims, the court must construe the complaint liberally. Erickson v. Pardus, 551 U.S. 89, 94 (2007). However, I must dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B).

I understand plaintiff to be bringing a claim that defendants violated his right to medical care under the Eighth Amendment by failing to provide him medication for his mental health problems. A prison official may violate this right if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to

be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir.1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures to provide it. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir.1997).

I conclude that plaintiff's schizophrenia constitutes a serious medical need. That leaves the question whether any of the defendants acted with deliberate indifference. Plaintiff alleges that defendant McQueeney met with him to talk about Lonozepam, that McQueeney placed an order for this medication, but that the order was denied by his supervisor, defendant John Doe. I conclude that plaintiff states a deliberate indifference claim against the John Doe supervisor because that defendant was the one responsible for denying plaintiff his medication. Plaintiff fails to state a claim against defendant McQueeney because plaintiff does not allege that it was McQueeney's decision to withhold the medication.

Similarly, plaintiff alleges that defendants Heidorn and Zwiers were aware that plaintiff was not receiving his medication, but that they did not intervene. I conclude that plaintiff fails to state a claim against these defendants because he does not explain what they could have done to intervene given that defendant John Doe supervisor denied plaintiff's medication.

As for defendants Doyle and Raemisch, plaintiff alleges merely that they "permitted" the denial of his medication to take place because they are "in control[]" of all Department of Corrections employees. Under 42 U.S.C. § 1983, the statute authorizing lawsuits for constitutional violations, a person may not be held liable unless he was personally involved in the violation. This means that an official must have participated in the alleged conduct or facilitated it. It is not enough to show that a particular respondent is the supervisor of someone else who committed a constitutional violation. Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir. 2009) ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise.") Because plaintiff fails to state that defendants Doyle or Raemisch were personally involved in the deprivation of his medication, I will deny him leave to proceed against them.

Finally, plaintiff states that defendant Warden Pollard is involved in reviewing inmate grievances, but that he responded to plaintiff's complaint about his medication by saying that "he doesn't care" about plaintiff's condition. Usually, a defendant in Pollard's position as warden is entitled to delegate the medical treatment of prisoners to medical staff, Burks, 555 F.3d at 595, which means a failure to personally intervene does not violate the Eighth Amendment. However, in the present case, plaintiff seems to be alleging that defendant Pollard has intervened in plaintiff's care, if only to reject his complaints out of personal animosity rather than a desire to delegate these tasks to others. These allegations suggest that defendant Pollard acted with deliberate indifference toward plaintiff, so I conclude that plaintiff states an Eighth Amendment claim against Pollard.

D. Preliminary Injunctive Relief

Because plaintiff is alleging that he is in imminent danger, I construe his complaint as including a request for preliminary injunctive relief. Under this court's procedures for obtaining a preliminary injunction, a copy of which is attached to this order, plaintiff must file with the court and serve on defendants a brief supporting his claim, proposed findings of fact and any evidence he has to support his request for relief. He may have until December 30, 2010 to submit these documents. Defendants may have until the day their answer is due in which to file a response. I will review the parties' preliminary injunction submissions before deciding whether a hearing will be necessary.

Despite the fact that I have allowed plaintiff to proceed on his claims, I wish to make it clear to him that the bar is significantly higher for ultimately prevailing on his claims than it is on his request for leave to proceed. In his proposed findings of fact, plaintiff will have to lay out the facts of his case in detail, identifying the problems he is suffering from, when and how he sought treatment and how defendants responded. Plaintiff will have to show that he has some likelihood of success on the merits of his claim and that irreparable harm will result if the requested relief is denied. If he makes both showings, the court will move on to consider the balance of hardships between plaintiff and defendants and whether an injunction would be in the public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

Finally, I warn plaintiff about the ramifications facing litigants who abuse the imminent danger exception to their three-strike status. The only reason that plaintiff has

been allowed to proceed in forma pauperis in this case is that his allegations suggest that he was under imminent danger of serious physical injury at the time that he filed his complaint. The "imminent danger" exception under 28 U.S.C. § 1915(g) is available "for genuine emergencies," where "time is pressing" and "a threat . . . is real and proximate." Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002). In certain cases it may become clear from the preliminary injunction proceedings that a plaintiff who has already received three strikes under § 1915(g) for bringing frivolous claims has exaggerated or even fabricated the existence of a genuine emergency in order to circumvent the three-strikes bar. In such a case, this court may revoke its grant of leave to proceed in forma pauperis once it is clear that plaintiff was never in imminent danger of serious physical harm. Plaintiff would then be forced to pay the full $350 filing fee or have his case dismissed.

E. John Doe Defendant

It is this court's practice to move as quickly as possible with the preliminary injunction proceedings in cases where a plaintiff alleges that he is in imminent danger of serious physical injury. One impediment to resolving these proceedings quickly is plaintiff's inability to identify the John Doe defendant psychiatric supervisor who allegedly denied defendant McQueeney's order to provide plaintiff with Lonozepam. Because defendants are in better position to identify the Doe defendant, they should submit to plaintiff and the court the identity of this supervisor as soon as possible so that the parties can fully brief plaintiff's motion for preliminary injunctive relief. Should they be unable to ascertain the

identity of the Doe defendant, they will have until the day their answer is due to inform plaintiff and the court of that fact. Until plaintiff is given the name of the supervisor, he should continue to refer to him or her as John Doe in his brief or supporting materials.

ORDER

IT IS ORDERED that

1. Plaintiff Dwayne Almond is GRANTED leave to proceed on Eighth Amendment deliberate indifference claims against defendants John Doe and William Pollard.

2. Plaintiff is DENIED leave to proceed on his claims against defendants R. McQueeney, Richard Heidorn, Jeananna Zwiers, James Doyle and Rick Raemisch. These defendants are DISMISSED from the case.

3. Plaintiff may have until December 30, 2010, in which to file a brief, proposed findings of fact and evidentiary materials in support of his motion for a preliminary injunction. Defendants may have until the date their answer is due to file a response and inform plaintiff and the court the identity of the John Doe defendant.

4. No later than December 30, 2010, plaintiff is to submit a trust fund account statement covering the period between April 19, 2010 and October 19, 2010. Once plaintiff submits the required trust fund account statements, the court will assess him an initial partial payment, which he is to pay from the next deposit to his account.

5. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will

be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendants or their attorney.

6. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on the state defendants. Although it is usual for defendants to have 40 days under this agreement to file an answer, in light of the urgency of plaintiff's allegations, I would expect that every effort will be made to file the answer in advance of that deadline.

Entered this 9th day of December, 2010.

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