

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JACKIE CARTER,

Plaintiff,

v.

OPINION AND ORDER

10-cv-280-wmc

GREGORY GRAMS, JANEL NICKEL,
DYLAN RADTKE, C.O. MIECHUS,
C.O. JAKUSZ, C.O. PIETROWSKI,
MARY LIESER, AMY MILLARD,
DAVID LIPINSKI, LORI ALSUM,
DIALIA SULIENE, C.O. RHODES,
ALICE ROGERS, K. LLOYD and
CAPTAIN TRATTLES,

Defendants.

In this action, plaintiff Jackie Carter is suing prison administrators, correctional officers, medical staff and complaint examiners for subjecting him to cruel and unusual punishment by withholding medical treatment, meals, mattress, pillows and toilet paper, forcing him to stand on his painful, swollen, feet and withholding his legal mail. Carter requests leave to proceed *in forma pauperis*. He has also filed two motions to appoint counsel and a motion for preliminary injunctive relief.

This case is pending before the court for screening pursuant to 28 U.S.C. § 1915A. Under this statute, the court must dismiss the complaint if it 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. 28 U.S.C. § 1915A.

For reasons set forth briefly below, the court concludes that plaintiff may proceed on his claims regarding the withholding of medical treatment, meals, mattress, pillows and toilet paper, as well being forced to stand. He will not be allowed to proceed on his

claim regarding legal mail. The court will also set briefing on his motion for preliminary injunctive relief, but deny his motions for appointment of counsel.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's complaint, the court must read the allegations generously, and hold the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Carter alleges, and the court assumes for purposes of this screening order, the following facts.

- Plaintiff Jackie Carter is currently confined at the Columbia Correctional Institution.
- Carter suffers from back, hip, neck and foot ailments, for which he has been prescribed pain medication.
- Defendant correctional officers Jakusz, Miechus, Pietrowski, Rhodes and defendant health services manager Lori Alsum have been denying Carter meals and his prescribed pain medications. Carter is vomiting from hunger and withdrawal from his medications.
- Jakusz, Miechus, Pietrowski and Rhodes force Carter to stand on his extremely swollen and painful feet because he reported their misconduct.
- Jakusz took the mattress and pillows that were prescribed for Carter to deal with his back, hip, neck and foot pain.
- Jakusz and Miechus will not give Carter toilet paper.
- Prison staff is refusing to let Carter see an eye doctor, despite his vision being blurred from a concussion he suffered years ago.
- Defendants Alice Rogers and K. Lloyd hold mail that Carter tries to send to the court or attorneys.
- Defendant Captain Trattles has "allowed and assisted Jakusz in harming" Carter.

- Defendant complaint examiners Mary Lieser, David Lipinski and Amy Millard do not properly process Carter's grievances; instead they send the grievances back to him for invalid reasons.
- Carter has informed defendant prison officials Gregory Grams, Janel Nickel and Dylan Radtke, as well as defendant prison medical staff Dr. Dialia Suliene and health services manager Lori Alsum of these problems, but they have done nothing.

OPINION

I. Imminent Danger Status

A. Three Strike Threshold

In previous cases filed by Carter, the court has noted that he has been barred from proceeding *in forma pauperis* under 28 U.S.C. § 1915(g), which 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.

This court has previously assigned Carter three "strikes" under this provision because at least one of his claims in each of three cases was dismissed as legally frivolous. *Carter v. Frank*, 07-cv-713-bbc (W.D. Wis. June 4, 2008); *Carter v. Raemisch*, 09-cv-75-wcg (E.D. Wis. Mar. 3, 2009); and *Carter v. Huibregtse*, 09-cv-427-bbc (W.D. Wis. Mar. 3, 2010). In a recent opinion, however, 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 one claim out of several is dismissed under § 1915(g). *Turley v. Gaetz*, 625 F.3d 1005, 1012 (7th Cir. 2010).

Under this new rule, Carter should not have been assessed a strike in case no. 09-cv-427-bbc, because several claims survived initial screening. Accordingly, Carter has not “struck out” under § 1915(g) and may bring claims even if they do not assert that he is in imminent danger of serious physical harm. This change has little effect on the current case, however, because the main thrust of Carter’s claims is that he is not being fed and being given his prescription medications and that prison staff is making him stand on his painful, swollen feet.

B. Related Proceedings

Carter’s complaint in this case partially overlaps another case which he is currently proceeding, case no. 09-cv-437. In that case, the court held a telephonic status conference on November 12, 2010, to determine how best to address Carter’s motion for preliminary injunctive relief. After that conference, the court recruited counsel for the limited purposes of consulting on claims raised in that case, considering whether any of the claims Carter raised in his other complaints could be consolidated with that case and deciding whether Carter and counsel could agree on further representation. Carter’s motion for preliminary injunctive relief was denied in a June 23, 2011 order. On November 18, 2011, the court held a status conference to discuss to how proceed with 09-cv-437-wmc, as well as Carter’s other pending cases. At the conference, the court concluded that the court-appointed attorneys had fulfilled their obligation to represent Carter for the limited purposes outlined above and concluded that Carter’s cases should proceed with him acting *pro se*.

Notwithstanding the ongoing proceedings in case no. 09-cv-437-wmc, the court must still screen the allegations contained in Carter's complaint in this case.

II. Eighth Amendment Claims

I. Denial of Prescribed Treatment

The Eighth Amendment requires the government to “provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of inmates.’” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a “serious medical need” and that prison officials were “deliberately indifferent” to this need. *Id.* at 104.

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). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997), “significantly affects an individual's daily activities,” *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998), or otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer*, 511 U.S. at 847. “Deliberate indifference” means that defendant was aware that the prisoner needed medical treatment but disregarded the risk by failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

Carter's complaint is somewhat vague, but the court understands him to be alleging that defendants Jakusz, Miechus, Pietrowski, Rhodes and Alsum are withholding Carter's prescribed pain medication, and that Jakusz took the mattress and pillows that were prescribed for Carter to deal with his back, hip, neck and foot pain. At this preliminary stage, these allegations are sufficient to state Eighth Amendment claims against these defendants for being deliberately indifferent to his serious medical needs.

2. Denial of Meals and Toilet Paper

A prisoner may maintain an Eighth Amendment claim when prison officials act with deliberate indifference in denying him the "minimal civilized measures of life's necessities." *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997). "[I]n some circumstances an inmate's claim that he was denied food may" be sufficient to state a claim under the Eighth Amendment. *Reed v. McBride*, 178 F.3d 849, 853 (7th Cir. 1999). Life's "necessities" may also include hygiene items. *Jiles v. Breen-Smith*, 2009 WL 4827065 at *5 (W.D. Wis. Dec. 8, 2009).

The court understands Carter to be bringing Eighth Amendment claims against (1) defendants Jakusz, Miechus, Pietrowski, Rhodes and Alsum for denying him meals until he vomited from hunger; and (2) Jakusz and Miechus for denying Carter toilet paper. Again, at this preliminary point in the proceedings, Carter's allegations are sufficient to state Eighth Amendment claims against these defendants.

3. Excessive Force/Retaliation

Next, Carter alleges that defendants Jakusz, Miechus, Pietrowski and Rhodes force him to stand on his extremely swollen and painful feet because he reported their misconduct. The court understands Carter to be attempting to bring excessive force and retaliation claims against these defendants.

To state an Eighth Amendment excessive force claim, a plaintiff must allege that the defendant applied force “maliciously and sadistically for the very purpose of causing harm,” rather than “in a good faith effort to maintain or restore discipline.” *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The factors relevant to this determination include: why force was needed; how much force was used; the extent of the injury inflicted; whether defendant reasonably perceived a threat to the safety of staff and prisoners; and whether efforts were made to temper the severity of the force. *Whitley*, 475 U.S. at 321.

To state a claim for retaliation, a plaintiff must identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by each defendant that would deter a person of “ordinary firmness” from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff’s protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009).

Although Carter’s allegations contain very limited detail, the court concludes for screening purposes that he has stated an excessive force claim against defendants for forcing him to stand on his swollen feet, because it can be reasonably inferred from the

facts pled that defendants did so to inflict pain upon Carter. Because reporting misconduct is a “protected activity” he also states a retaliation claim. *See, e.g., DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000) (“a prison official may not retaliate against a prisoner because that prisoner filed a grievance”).

4. Supervisors/Complaint Examiners

Carter purports to bring claims against defendants Grams, Nickel, Radtke, Suliene and Alsum for doing nothing after Carter alerted them to the alleged denials of medication, food and toilet paper, as well as being forced to stand on his swollen feet. He also states that defendant complaint examiners Mary Lieser, David Lipinski and Amy Millard sent back his grievances about these issues for invalid reasons. At this point in the proceedings, Carter’s allegations are sufficient to state Eighth Amendment claims against these defendants. As the case proceeds, however, he will also have to show that each defendant had a responsibility to respond to his complaints, yet failed to help him. *See Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir. 2009) (rejecting "contention that any public employee who knows (or should know) about a wrong must do something to fix it").

5. Other Claims/Defendants

Carter raises several other claims on which he will not be allowed to proceed. For instance, Carter states that “prison staff” is refusing to let him see an eye doctor, but he does not explain which defendants are denying him this treatment. Under Fed. R. Civ. P.

8, Carter's complaint is required to contain "a short and plain statement" of each claim showing that he is entitled to relief. "The primary purpose of [Rule 8] is to give defendants fair notice of the claims against them and the grounds supporting the claims." *Stanard v. Nygren*, 658 F.3d 792, 797 (7th Cir. 2011) (citations omitted). Carter does not do so.

Similarly, Carter alleges that defendant Captain Trattles has "allowed and assisted Jakusz in harming" him, but he does not explain how he was involved or what he did to assist Jakusz. The court will also dismiss Trattles from the lawsuit because the complaint does not provide proper notice of what he did to harm Carter.

Carter also alleges that defendants Alice Rogers and K. Lloyd have been holding mail that Carter tries to send to the court or attorneys. While prisoners have a well-recognized constitutional right of access to the courts for challenging the conditions of their confinement, *Lehn v. Holmes*, 364 F.3d 862, 865-66 (7th Cir. 2004), the prisoner must allege facts from which an inference can be drawn of "actual injury." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). This rule is derived from the doctrine of standing and requires the prisoner to demonstrate that a non-frivolous legal claim has been frustrated or impeded. *Id.* In other words, the prisoner must plead at least general factual allegations suggesting he "has suffered an injury over and above the denial." *Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir. 1998). At a minimum, he must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." *Id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint).

In his complaint, Carter does not indicate what documents have been held or point to any lawsuit that that been frustrated by defendants' actions. Indeed, this court's records show that Carter has filed several lawsuits in the past three years and has seemingly had no problem submitting documents for those cases. Therefore he will not be allowed to proceed on an access to the courts claim.

Finally, Carter raises allegations reading the denial of medically authorized shoes, but that claim is being litigated in case no. 09-cv-437-wmc, as previously discussed. Thus, it does not need to be addressed in this case.¹ Because of the overlapping nature of these claims, the court will, however, consider consolidating these lawsuits following issuance of its summary judgment decision in '437 to the extent it would serve the efficient administration of justice.

III. Initial Partial Payment

Because Carter has not submitted the \$350 filing fee for this case, the court construes his complaint as including a request for leave to proceed *in forma pauperis*. From the trust fund account statements Carter has previously submitted to the court, his initial partial payment has been calculated to be \$11.30. If Carter does not have the money to make the initial partial payment in his regular account, he will have to arrange with prison authorities to pay some or all of the assessment from his release account. This does not mean that Carter is free to ask prison authorities to pay all of his filing fees from his

¹ Except for the claim involving denial of medically-necessary footwear and the unreasonably vague claim against Trattles, all of the other claims would also have been dismissed as not sufficiently related to be part of a single lawsuit. *See* Fed. R. Civ. P. 20.

release account. The only amount Carter must pay at this time is the \$11.30 initial partial payment. Before prison officials take any portion of that amount from Carter's release account, they may first take from Carter's regular account whatever amount up to the full amount he owes. Carter should show a copy of this order to prison officials to insure that they are aware they should send his initial partial payment to this court. If Carter fails to submit the initial partial payment by the deadline set by the court, the clerk of court will be directed to close this case without prejudice to Carter refiling his case at a later date.

IV. Motion for Preliminary Injunctive Relief

Carter has filed a motion for preliminary injunctive relief regarding his claims. Under this court's procedures for obtaining a preliminary injunction, a copy of which is again attached to this order, (and as Carter should know full well from similar motions in other lawsuits before this court), he 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. The court will review the parties' preliminary injunction submissions before deciding whether a hearing will be necessary.

Based on past proceedings, Carter should also be aware that the bar for obtaining a preliminary injunction is significantly higher than it is for obtaining leave to proceed. In his proposed findings of fact, Carter will have to lay out the facts of his case *in detail*, identifying the problems he is suffering from, when and how he sought a remedy and how defendants responded. Carter 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 Carter and defendants and whether a preliminary 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).

V. Motions for Appointment of Counsel

Carter has filed two motions for appointment of counsel. As set forth above, the court already appointed counsel for Carter for the purpose of consulting with him about similar claims raised in several of his pending cases, as well as held a hearing about his various claims. Ultimately, the court concluded that it was appropriate for Carter to proceed *pro se* in each of his lawsuits. *See Carter v. Radtke*, Case No. 09-cv-437-wmc, slip op. (Dec. 2, 2011). For the same reasons, the court will deny his motions for appointment of counsel.

VI. Status Conference

The court’s usual practice is to hold a preliminary pretrial conference with Magistrate Judge Stephen Crocker following the filing of defendants’ answer, at which the parties are instructed about the schedule of the case moving forward and this court’s procedures concerning discovery and dispositive motions. Because the parties are already in the midst of litigating case no. 09-cv-437-wmc, however, the present case should be able to proceed with a truncated schedule. The court will, therefore, hold a telephonic

scheduling conference before Judge Conley on April 18, 2013 at 10 a.m. to set a schedule for resolution of this lawsuit.²

ORDER

IT IS ORDERED that:

- (1) Plaintiff Jackie Carter is GRANTED leave to proceed on the following claims:
 - (a) defendants Jakusz, Miechus, Pietrowski, Rhodes and Alsum are withholding Carter's prescribed pain medication, Jakusz took the mattress and pillows that were prescribed for Carter to deal with his back, hip, neck and foot pain, defendants Grams, Nickel, Radtke, Suliene and Alsum have done nothing after plaintiff alerted them to these deprivations, and defendants Lieser, Lipinski and Millard sent back his grievances about these issues for invalid reasons.
 - (b) Jakusz, Miechus, Pietrowski, Rhodes and Alsum are denying plaintiff meals, Jakusz and Miechus are denying him toilet paper, Grams, Nickel, Radtke, Suliene and Alsum have done nothing after plaintiff alerted them to these deprivations and Lieser, Lipinski and Millard sent back his grievances about these issues for invalid reasons.
 - (c) Jakusz, Miechus, Pietrowski and Rhodes force plaintiff to stand on his extremely swollen and painful feet because he reported their misconduct, Grams, Nickel, Radtke, Suliene and Alsum have done nothing after plaintiff alerted them to these deprivations and Lieser, Lipinski and Millard sent back his grievances about these issues for invalid reasons.
- (2) Plaintiff is DENIED leave to proceed on claims that prison staff is refusing to let him see an eye doctor, that defendants Alice Rogers and K. Lloyd have been holding his legal mail, that defendants are withholding his medically prescribed shoes and that defendant Trattles is assisting defendant Jakusz. Defendants Rogers, Lloyd and Trattles are DISMISSED from the case.
- (3) Plaintiff may have until March 22, 2013, in which to file a brief, proposed findings of fact and evidentiary materials in support of his motion for a

² The court anticipates issuing an opinion on defendants' motion for summary judgment in case no. 09-cv-437-wmc within the next month. Should any of Carter's claims survive summary judgment, the April 18 scheduling conference will include that case as well.

preliminary injunction. Defendants may have until the date their answer is due to file materials in response.

- (4) Plaintiff's motions for appointment of counsel, dkt. #30, 36, are DENIED.
- (5) A telephonic scheduling conference will be held on April 18, 2013 at 10 a.m.
- (6) Plaintiff is assessed \$11.30 as an initial partial payment of the \$350 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in the amount of \$11.30 on or before March 22, 2013.
- (7) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's supplemental complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.
- (8) For the time being, plaintiff must send defendants a copy of every paper or document 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 plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.
- (9) 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.

Entered this 28th day of February, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge