IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DWAYNE ALMOND,

Plaintiff,

v.

MARK LESATZ, LT. SWIEKATOWSKI, JEAN LUTSEY, MICHAEL J. MOHR, JEANANNA ZWIERS, DR. RICHARD HEIDORN, MICHAEL BAENEN, J.B. VAN HOLLEN, JOSEPH GANZER, and ANN PEACOCK,[1]

Defendants.

OPINION and ORDER

11-cv-333-bbc

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Plaintiff Dwayne Almond filed this action under 42 U.S.C. § 1983, alleging that defendants have failed to provide him with adequate medical treatment both in the past and the present, and that they have misled this court into believing that he failed to exhaust his administrative remedies in previous litigation. In a June 24, 2011 order, I told plaintiff that because he has struck out under 28 U.S.C. § 1915(g), he could proceed in forma pauperis

[1] Plaintiff has amended his complaint to include defendants Heidorn and Baenen, so I have added them to the caption. In addition, plaintiff formally includes "John Doe Attorney General" in the caption of his complaint but then names J.B. Van Hollen, Joseph Ganzer and Ann Peacock as defendants in his allegations. I have substituted these named defendants for the John Doe defendant in the caption.

only if he alleged facts from which an inference may be drawn that he is in imminent danger of serious physical injury. Because his past claims did not meet the imminent danger standard while his claims for present case might, I asked plaintiff to respond, indicating whether he wanted to prepay the $350 filing fee to proceed with all of his claims or drop the claims of past harm in an attempt to proceed in forma pauperis with his claims for present care. Also, I told plaintiff that his claims regarding his current care violated Fed. R. Civ. P. 8 for being too vague, and gave him an opportunity to amend his complaint to provide more detailed allegations.

Now plaintiff has responded by stating that he wishes to pursue only his claims regarding his present medical care, and he has submitted two separate proposed amended complaints. Because they are virtually identical, I will consider the first of these, dkt. #6, to be plaintiff's proposed amended complaint and will ignore the second, dkt. #7. (Although dkt. #6 is now the operative pleading in the case, I note that plaintiff fails to include a formal request for relief in the amended complaint. I will consider plaintiff's requests for money damages and injunctive relief in his original complaint as a supplement to the amended complaint.)

After considering plaintiff's allegations, I conclude that his claims regarding his current medical care meet the imminent danger standard. I will grant plaintiff leave to proceed on his claims against defendants Richard Heidorn, Jeananna Zwiers, Jean Lutsey and Michael Baenen, but deny him leave to proceed on the remainder of his claims. 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 incarcerated at the Green Bay Correctional Institution. Plaintiff suffers from lower back and abdominal ailments, such as lower back pain, lower abdominal pain and swelling. Plaintiff feels like his lower abdomen is being "eaten up" by an infection. On February 19, 2010, defendant Richard Heidorn, a physician, examined plaintiff and found "questionable" lower back pain. Heidorn ordered further tests, including x-rays, around February 25, 2010. The results showed a "minimal amount of air in [plaintiff's] small bowel." Despite these results, Heidorn has denied plaintiff adequate medical treatment for these ailments.

Defendant Jeananna Zwiers tells plaintiff that she does not "have anything to say to [him]" because she and other prison staff were granted summary judgment in a similar previous lawsuit about medical treatment filed by plaintiff, Almond v. Pollard, 09-cv-335-bbc (W.D. Wis. Mar. 1, 2011). Similarly, defendants Nurse Jean Lutsey and Warden Michael

Baenen[2] ignore plaintiff's conditions because they have been informed that plaintiff lost the previous lawsuit.

Defendants J.B. Van Hollen, Wisconsin attorney general, and Joseph Ganzer and Ann Peacock, assistant attorneys general, have seen copies of plaintiff's test results in the course of representing state officials in one of plaintiff's previous cases, yet are permitting defendants to ignore plaintiff's condition.

DISCUSSION

A. Imminent Danger

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)). 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

[2] Plaintiff refers to this defendant as " Warden, Michael B." Public records provide defendant's full name.

"serious physical injury" under § 1915(g). Id. at 331.

Given this framework, I conclude that plaintiff's allegations that he is suffering severe back and abdominal pain qualify under the imminent danger standard.

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. From the trust fund account statement plaintiff has submitted, I calculate his initial partial payment to be $1.18. (Plaintiff should be aware that this does not relieve him of the duty of eventually paying the entire $350 filing fee for this case; he will be expected to pay off the balance of the fee in monthly installments.) If plaintiff 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 plaintiff is free to ask prison authorities to pay *all* of his filing fee from his release account. The only amount plaintiff must pay at this time is the $1.18 initial partial payment. Before prison officials take any portion of that amount from plaintiff's release account, they may first take from plaintiff's regular account whatever amount up to the full amount plaintiff owes. Plaintiff should show a copy of this order to prison officials to insure that they are aware they should send plaintiff's initial partial payment to this court. If, by September 19, 2011, plaintiff fails to make the initial partial payment or show cause

for his failure to do so, I will consider dismissing his case for his failure to pay the initial partial payment.

Usually, the court would wait for plaintiff to submit his initial partial payment before screening his complaint. However, because plaintiff alleges that he is in imminent danger of serious physical harm, I will proceed to screen his claims 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).

At the outset, defendants Mark Lesatz, Michael Mohr and Lt. Swiekatowski must be dismissed from the lawsuit because plaintiff includes no allegations about them in his amended complaint. In addition, plaintiff does not state a claim upon which relief may be granted against defendants J.B. Van Hollen, Joseph Ganzer and Ann Peacock. I understand plaintiff to be alleging that these lawyers are "permitting" medical staff to ignore plaintiff's medical needs even though they have seen plaintiff's medical records in previous cases. However, the attorney general's office merely represents Department of Corrections employees; there is no reason to believe that these attorneys are responsible for inmates'

medical care in any way. Under § 1983, there is no requirement that these government officials step in and intervene on behalf of plaintiff. The Court of Appeals for the Seventh Circuit has addressed this point:

> [The] view that everyone who knows about a prisoner's problem must pay damages implies that [a prisoner] could write letters to the Governor of Wisconsin and 999 other public officials, demand that every one of those 1,000 officials drop everything he or she is doing in order to investigate a single prisoner's claims, and then collect damages from all 1,000 recipients if the letter-writing campaign does not lead to better medical care. That can't be right.

Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009).

This leaves defendants Heidorn, Zwiers, Lutsey and Baenen. I understand plaintiff to be alleging that these defendants violated his Eighth Amendment rights by being deliberately indifferent to his back and abdominal problems.

Prison officials have a duty under the Eighth Amendment to provide medical care to those being punished by incarceration. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). 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. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

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 when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, "significantly affects an individual's daily

activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996) or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994).

"Deliberate indifference" means that the officials were 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).

Thus, under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendant know that plaintiff needed treatment?

(3) Despite defendant's awareness of the need, did defendant fail to take reasonable measures to provide the necessary treatment?

Plaintiff brings deliberate indifference claims against defendants for failing to treat both his back and abdominal ailments. Usually, in screening allegations such as these, I would routinely grant plaintiff leave to proceed because he has alleged that defendants were aware of plaintiff's serious medical problems and failed to treat them.

Although I will allow plaintiff to proceed on claims regarding medical treatment for both his back and abdomen, the claim about the treatment for his back must be discussed further. As plaintiff notes, I granted summary judgment in favor of defendants Heidorn and Zwiers in case no. 09-cv-335-bbc, in which plaintiff brought very similar claims regarding treatment for his back. (Plaintiff's claims in that case regarding a groin or abdominal ailment

were dismissed without prejudice for his failure to exhaust administrative remedies.) In the March 1, 2011 order granting summary judgment to defendants, I stated the following:

> After considering the summary judgment materials submitted by the parties, I conclude that defendants' motion for summary judgment must be granted. Although plaintiff asserts that he has not been treated for his back ailments, the undisputed facts show the opposite: the history of plaintiff's appointments with defendant Heidorn and other medical staff at the Green Bay Correctional Institution shows that plaintiff was seen on many occasions in response to his complaints of back pain and swelling. In addition, plaintiff had several rounds of x-rays or other tests, none of which showed any identifiable problem. Nonetheless, he was given various treatments for his ailments, such as pain medication, analgesic balm, ice and stretching exercises. In short, the record shows generally that the medical staff has provided plaintiff with treatment in response to his complaints. I do not doubt that plaintiff believes he is suffering from various back ailments requiring further treatment, but the Eighth Amendment does not entitle plaintiff to the treatment of his choice, Gutierrez v. Peters, 111 F.3d at 1374. He has not produced any evidence, such as expert testimony, suggesting that defendant Heidorn's treatment decisions were a substantial departure from accepted professional judgment. Estate of Cole, 94 F.3d at 261-62.

Almond, 09-cv-335-bbc, dkt. #151, at 10-11.

Thus, I have already concluded that prison staff were not deliberately indifferent to plaintiff's back problems during the timeframe of the claims in case no. 09-cv-335-bbc. Because plaintiff is alleging that defendants Heidorn, Zwiers, Lutsey and Baenen have acted with deliberate indifference in the time period *following* the timeframe of his claims in the previous case, I will allow him to proceed. However, I warn plaintiff that he will not be able to relitigate claims or issues that were litigated in case no. 09-cv-335-bbc. Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (issue preclusion bars successive litigation of an issue litigated and

resolved in valid court determination essential to prior judgment); Rizzo v. Sheahan, 266 F.3d 705, 714 (7th Cir. 2001) (claim preclusion is affirmative defense designed to prevent "'relitigation of claims that were or could have been asserted in an earlier proceeding.'") (citation omitted).

D. Preliminary Injunctive Relief

Because plaintiff is alleging that he is in imminent danger of serious physical harm and asks for "protection from cruel and unusual punishments," 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 September 19, 2011 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.

As plaintiff should be aware from his previous litigation in this court, the bar for obtaining a preliminary injunction is significantly higher than it is for obtaining 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.

ORDER

IT IS ORDERED that

1. Plaintiff Dwayne Almond's amended complaint, dkt. #6, is ACCEPTED as the operative pleading in this case.

2. Plaintiff is GRANTED leave to proceed on his Eighth Amendment claims against defendants Richard Heidorn, Jeananna Zwiers, Jean Lutsey and Michael Baenen that they are acting with deliberate indifference toward his back and abdomen ailments.

3. Plaintiff is DENIED leave to proceed on his claims against defendants J.B. Van Hollen, Joseph Ganzer and Ann Peacock. These defendants are DISMISSED from the case.

4. Defendants Mark Lesatz, Michael Mohr and Lt. Swiekatowski are DISMISSED from the case because plaintiff fails to include any allegations against them in his amended complaint.

5. Plaintiff may have until September 19, 2011, 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.

6. Plaintiff is assessed $1.18 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 $1.18 on or before September 19, 2011. If, by this date, plaintiff fails to make the initial partial payment or show cause for his failure to do so, I will consider dismissing his case for his failure to pay the initial partial payment.

7. For the time being, 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.

8. 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.

9. 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 29th day of August, 2011.

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