IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HAKIM NASEER,

ORDER

Plaintiff,

11-cv-004-bbc

v.

ICE KELLY TRUMM, TIM HAINES,
HSU Supervisor MARY MILLER and
UNKNOWN MAINTENANCE DEPARTMENT
PERSONNEL,

Defendants.

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Plaintiff Hakim Naseer, a prisoner at the Wisconsin Secure Program Facility, has filed this civil action alleging that hazardous chemicals have been placed in the water supply in his cell and that prison officials have refused to investigate this problem. In his complaint he includes a motion for preliminary injunctive relief.

Plaintiff seeks leave to proceed with his complaint in forma pauperis. However, because plaintiff has struck out under 28 U.S.C. § 1915(g), he cannot obtain indigent status under § 1915 unless his complaint alleges facts from which an inference may be drawn that he is in imminent danger of serious physical injury. After considering plaintiff's submissions, I conclude that plaintiff may proceed with Eighth Amendment conditions of confinement claims as well as First Amendment retaliation claims against defendants.

ALLEGATIONS OF FACT

Plaintiff Hakim Naseer is a prisoner at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin. Defendant Mary Miller is the Health Services Unit supervisor at the prison. Defendant Kelly Trumm is an inmate complaint examiner. Defendant Tim Haines also handles inmate complaints. Defendant John Does are maintenance personnel at the prison.

There are a number of ongoing criminal investigations against staff at the prison that were brought on behalf of plaintiff. After these investigations began, maintenance staff at the prison undertook "discreet construction work" on pipes affecting the water supply in plaintiff's cell. They connected plaintiff's water supply to hazardous chemicals, causing plaintiff's mouth to smell like "toxic waste." Every time plaintiff has complained about this, the maintenance department has corrected the problem, but then they "start the construction work process all over again," reintroducing dangerous chemicals.

Plaintiff asked defendant Miller to take samples of the drinking water, but she declined. Defendants Trumm and Haines failed to intervene by rejecting his inmate complaints.

Plaintiff now drinks only liquids from the items provided at meal times.

DISCUSSION

A. Imminent Danger

Plaintiff seeks leave to proceed in forma pauperis in this case under 28 U.S.C. § 1915.

However, as stated above, plaintiff has struck out under 28 U.S.C. § 1915(g), which 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 been denied leave to proceed in forma pauperis in lawsuits that were legally frivolous. Naseer v. Neumaier, 10-cv-399-bbc; (W.D. Wis. Sept. 29, 2010); Naseer v. Belz, 10-cv-27-bbc; (W.D. Wis. Feb. 16, 2010); Naseer v. Trumm, 09-cv-699-bbc (W.D. Wis. Dec. 11, 2009). Plaintiff remains struck out even following the November 2, 2010 opinion in Turley v. Gaetz, 09-3847, 2010 WL 4286368, in which 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 in which plaintiff received a strike was dismissed in its entirety.

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 his complaint, plaintiff alleges that hazardous chemicals have been introduced into the water

supply in his cell.

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, if only barely. Although plaintiff does not state that he has suffered any symptoms from drinking the water in his cell besides his breath smelling bad, his allegations that prison staff have intentionally put hazardous chemicals in his cell's water supply suffice to meet the imminent danger standard. 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 July 4, 2010 and January 4, 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).

1. Conditions of confinement

I understand plaintiff to be bringing the following Eighth Amendment conditions of confinement claims: (1) the John Doe maintenance defendants intentionally introduced

hazardous chemicals into the water supply in his cell; (2) defendant Miller refused to look into the problem when plaintiff complained; and (3) defendants Trumm and Haines rejected his complaints about the water.

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)). Conditions of confinement that expose a prisoner to a substantial risk of serious harm are unconstitutional. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

A conditions of confinement claim under the Eighth Amendment requires that plaintiff's allegations about the conditions satisfy a test that involves both a subjective and objective component. Farmer, 511 U.S. at 834. The objective component focuses on "whether the conditions at issue were sufficiently serious so that a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities." Townsend v. Fuchs, 522 F.3d 765, 773 (7th Cir. 2008) (internal quotations omitted). The subjective component focuses on "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994).

In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a

conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). To meet this component, "it is not enough for the inmate to show that the official acted negligently or that he or she should have known about the risk." Townsend, 522 F.3d at 773. Rather, "the inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference." Id.

After considering the allegations of the complaint, I conclude that plaintiff states a claim against defendants concerning the water quality in his cell. Carroll v. DeTella, 255 F.3d 470 (7th Cir. 2001) (poisoning water supply is form of cruel and unusual punishment). I conclude that his allegations that the John Doe maintenance defendants intentionally introduced hazardous chemicals into the water supply in his cell are sufficient to suggest that they were deliberately indifferent to his safety. In addition, construing plaintiff's allegations liberally, I will allow plaintiff to proceed against defendant Miller for refusing to look into the problem and against defendants Trumm and Haines for rejecting his inmate complaints.

2. Retaliation

I understand plaintiff to be bringing First Amendment retaliation claims against defendants, alleging that the John Doe maintenance defendants introduced hazardous chemicals into his water supply and that defendants Miller, Trumm and Haines failed to help plaintiff because he had persuaded authorities to pursue several criminal investigations

against staff at the prison.

To state a claim for First Amendment retaliation, plaintiff must (1) allege that he engaged in an activity protected by the First Amendment; (2) identify one or more retaliatory actions taken by defendants that would likely deter a person from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff's protected activity was a motivating factor in defendant's decision to take retaliatory action. Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009) (citing Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008).

Plaintiff has identified a protected activity, that of cooperating with law enforcement officials. McKinnie v. Heisz, no. 09-cv-188-bbc (W.D. Wis. May 7, 2009). Moreover, the alleged retaliatory actions, introducing hazardous chemicals into plaintiff's drinking water and then failing to investigate his complaints, are sufficiently adverse to "deter a person of ordinary firmness," a relatively low standard. Bridges, 557 F.3d at 552, 554-55. Finally, plaintiff alleges that defendants put the hazardous chemicals in his drinking water and then refused to investigate his complaints because of the criminal investigations that had been started on his behalf. That is sufficient to state a claim upon which relief may be granted. Thomson v. Washington, 362 F.3d 969, 970-71 (7th Cir. 2004) (plaintiff may state claim for retaliation by identifying the protected conduct and the alleged acts of retaliation). Accordingly, I will allow plaintiff to proceed on his retaliation claims against defendants.

D. Preliminary Injunctive Relief

Plaintiff's complaint includes 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 March 3, 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.

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, explaining how defendants were aware of the chemicals in his water and how that has affected plaintiff. 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 Hakim Naseer is GRANTED leave to proceed on Eighth Amendment conditions of confinement claims and First Amendment retaliation claims against defendants John Doe maintenance personnel, Mary Miller, Kelly Trumm and Tim Haines.

2. Plaintiff may have until March 3, 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 materials in response.

3. 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.

4. 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.

5. 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 10th day of February, 2011.

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